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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 473

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Petitioners,*

v.

BEN CUTLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 16, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No.

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v.

BEN CUTLER, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners American Federation of Musicians of the United States and Canada (AFL-CIO) and its Local 802, Associated Musicians of Greater New York, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 30, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 316 F. 2d 546 and is reprinted in Appendix A, pp. 1a-7a, *infra*. The opinion of the District Court for the Southern District of New York is reported at 211 F. Supp. 433 and is reprinted in Appendix B, pp. 7a-35a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1963. A timely petition for rehearing was denied on May 17, 1963. By order of Mr. Justice Harlan, the time for filing this petition for a writ of certiorari was extended to and including September 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. May a federal appellate court affirm an injunction grounded on a violation of a criminal statute by substituting its own factual assumptions for the uncontested findings of the trial court?

2. Does Section 302 of the Labor-Management Relations Act of 1947, as amended, render criminal the fulfillment by union members of obligations imposed on them solely as members?

3. Is the test for determining whether a person is an employer for purposes of the Labor-Management

Relations Act, as amended, the right of control as established by the contract of the parties?

4. Does the federal commerce power extend to the performance of single musical engagements at weddings, dances, and confirmations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves §§ 2(3) and 302 of the Labor-Management Relations Act of 1947 as amended, 61 Stat. 136, *et seq.*, 29 U.S.C. 141 *et seq.*, and Art. I, § 8, cl. 3, and the First Amendment of the United States Constitution. These are reprinted in pertinent part in Appendix C, p. 36a, *infra.*

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner American Federation of Musicians (hereafter AFM), is an international labor organization with a membership of approximately 260,000 professional musicians in the United States and Canada. Petitioner Local 802 is an affiliate of AFM with jurisdiction over the five boroughs of New York City and Nassau and Suffolk Counties. The present suit was brought by Respondent Ben Cutler, a professional musician and member of Local 802 and AFM, to enjoin the enforcement of union regulations requiring all members when performing as leaders to collect and transmit these unions' work taxes on the ground that such conduct violates § 302 of the Labor-Management Relations Act of 1947 as amended, 29 U.S.C. § 186 (hereafter referred to as "the Act").

This case involves "single engagements." A "single engagement" is "a musical performance generally for one night but always less than one week" on such social occasions as weddings, confirmations, fraternity dances, etc. (R. 193b).[1] Normally, the purchaser of the music (the father of the bride, organizational social chairman, etc.) contacts a musician and tells him that he desires a specified number of instrumentalists for a particular time and place. This musician (the "leader") then obtains other musicians ("sidemen") to perform the engagement with him. Every leader is an instrumentalist and, generally, the leader performs on an instrument when leading.

The nature of employment for single engagements is highly casual. The musicians playing a particular engagement will often never play together again. The same musician may be a leader one night and a sideman the next. Local 802 maintains an exchange floor where members frequently exchange engagements so that a leader who engages a member for one engagement becomes himself the sideman for the same member whom he had engaged as a sideman for the prior engagement. Some musicians, (a small fraction of the total number who perform as leaders) who are more successful than others in obtaining engagements, devote their full time to being orchestra leaders. They have their own offices, engage in advertising, and call the performing group by their own name. Respondent Cutler is one of these. He performs on an instrument when he leads.

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[1] The record in this case, by stipulation of the parties (R. 187b-188b), is based on the pleadings herein, the testimony in a related case, *Carroll* v. *AFM*, and testimony taken in connection with the motion for preliminary injunction in the present case. The *Carroll* complaint was dismissed on the ground that plaintiffs were not members of the defendant unions, and hence not subject to the union regulations they challenged. 206 F. Supp. 478 (S.D.N.Y.). The Court of Appeals affirmed that decision on the same day that it decided the present case. 316 F. 2d 574. The two volumes (gray and white-covered) constituting the record appendix in *Carroll* v. *AFM*, Nos. 27769-72 in the court below, are being filed with the Clerk.

But, unless otherwise indicated, "R." refers herein to the blue-covered record appendix of the instant case in the court below.

The Federation prescribes a form agreement for the employment of its members. This contract, known as the Form B Agreement, provides that the purchaser of the music shall be the employer of the musicians and states that he "shall at all times have complete control over the services of employees under this contract * * *". The amount of wages which the purchaser of the music must pay for the services of the musicians is set forth in the contract, subject to minimums established by the local in whose jurisdiction the engagement is to be played.

II. PROCEEDINGS IN THE COURTS BELOW

A. The District Court

On July 23, 1962, respondent Cutler and certain other musicians brought this suit in the United States District Court for the Southern District of New York to enjoin the enforcement of certain provisions of the By-laws of the AFM and Local 802 respecting work taxes.[2] These By-laws may be described briefly.

Article 15 of the AFM By-laws require (with some exceptions not here relevant) every member performing outside the jurisdiction of his home local to pay a work tax to the AFM amounting to 10% of the minimum scale that the local in whose jurisdiction the engagement takes place has established for its own members. The AFM By-laws also provide that traveling musicians be paid (by the purchaser of the music) at least 10% more than the minimum wages established for that local's members.

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[2] Following the decision below, the AFM and Local 802 amended their respective by-laws to eliminate these work taxes, effective January 1, 1964. Many of the AFM's other locals retain their work taxes, some of which are the subject of pending or threatened litigation. In any event, the cessation of a course of action out of respect for a judicial decree does not render moot an appeal from such decree. See *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 42-43; *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632.

The By-laws of Local 802, as well as those of many other locals, require every member of the local working within its jurisdiction to pay a work tax to the local. The current Local 802 tax is 1½% of the scale.

The complaint did not challenge the right of the defendants to assess these work taxes. It attacked only the method of collection. The leader, upon receipt of payment from the purchaser of the music, transmits the taxes imposed on all members to the union. The gravamen of the complaint was that leaders who are employers are forbidden by § 302 of the Act so to do. It alleged that the performance of single musical engagements is an "industry affecting commerce," that each plaintiff leader is an "employer," and that the transmission of the taxes to the union is therefore an employer payment to the representative of his employees prohibited by § 302. The unions urged that respondent's activities were not within the federal commerce power, that the purchaser of the music rather than the leader is the employer and that in any event § 302 is not applicable to these transactions because they are solely membership obligations having no relationship to the employer status of the leader.

The District Court (Levet, J.) found that respondent Cutler was engaged in interstate commerce, rely-ing on a finding that "Cutler fulfills engagements outside the State of New York, in which he usually operates and in which his principal office is located" (Finding No. 8, App. B, p. 13a, *infra*), and on numerous provisions of the unions' by-laws which, he found, demonstrate "that defendant unions represent members both leaders and sidemen in the single engagement field whose engagements require a constant continuous stream of commerce between the states of the United States." (Finding No. 7, App. B, p. 13a, *infra*).

Judge Levet further concluded that the leader rather than the purchaser of the music is the employer, citing *Carroll* v. *AFM*, 295 F. 2d 484 (C.A. 2),[3] and his factual findings of the indicia of Cutler's employer status. He did not discuss the applicability of the Form B Contract.

With respect to the unions' defense that § 302 is in any event inapplicable as a matter of law, the court said simply, "Section 186 [of the U.S. Code, § 302 of the Act] applies to these payments and since they do not comply with the exceptions in 186(c), they are unlawful" (App. B, p. 31a, *infra*). The District Court thereupon issued an order enjoining defendants from enforcing the 1½% tax and the 10% tax against respondent when acting as an employer in the single engagement field (R. 219b-225b).

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[3] That decision in turn had relied on *Cutler* v. *United States*, 180 F. Supp. 360, wherein the Court of Claims had found the present respondent was liable as employer for payment of taxes under the social security laws.

B. The Court of Appeals

The AFM and Local 802 appealed to the Court of Appeals.[4] On April 30, 1963, that court affirmed the judgment of the District Court.

The Court agreed, for the reasons stated by Judge Levet, with the finding that the single engagement field is an industry affecting commerce. The Court also agreed with the District Court that Cutler is the employer: He "has all effective control of the orchestra; he hires the sidemen, decides how much is to be charged for the performance and what share is to be allocated to each sideman, subject of course to union minimum charges. He also pays all the expenses of each performance, workmen's compensation, insurance premiums, withholding taxes and other taxes." App. A, p. 5a, *infra*. The Court expressly rejected the unions' reliance on the Form B Contract which designates the purchaser as the employer: "We find the designation in the Form B Contract to be a self-serving subterfuge which is not entitled to any weight." App. A, p. 5a, *infra*.

With respect to the union's construction of § 302, the Court of Appeals reached the same result as the District Court, but only by rejecting its uncontested factual findings and its legal reasoning [App. A, pp. 6a-7a, *infra*]:

> We do not agree that the leader's membership in the union immunizes him from the limitations

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[4] The AFM and Local 802 simultaneously appealed the granting of a preliminary injunction in favor of the other plaintiffs-intervenors, as to whom no final judgment had been entered by the District Court. Certiorari is not sought from the Court of Appeals' affirmance of this order because of the discretionary nature of a preliminary injunction.

which § 302 imposes upon him because of his being an employer. He is not merely performing a ministerial task for the union, that is, collecting and paying over his and the sidemen's dues and exactions. *In fact, the leader is not really collecting the tax and surcharge from the sidemen at all; he is actually paying the union out of his own share.* It is true that union regulations require the 1½ per cent to be deducted from the scale wage. But the actual amount paid to sidemen is often above scale, dependent entirely upon bargaining between the leader and each sideman.[7] The requirement that the leader turn over the tax is undoubtedly considered in arriving at the payment, obviating the need for any deduction.[8] *It is clear that the 10 per cent surcharge is an exaction from the leader's share. The amount is never deducted from the sidemen's wages.* In fact two percent of the scale wage is ultimately paid over to the sidemen.[9]

The unions argue that leaders may become members and pay union exactions even if they are self-employed because they are in wage or job competition, or economic interrelationship with other union members, see Los Angeles Meat and Provision Drivers Union v. United States, 371 U.S. 94, 103 (1962). This is true so far as the payment of dues is concerned. *But the leader is here required to pay further exactions on a basis entirely different from that of other union*

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[7] There is no collective bargaining in this industry. [Court's footnote.]

[8] For example, if the union scale were $50, and the sidemen were paid the scale wage, $.75 would be deducted from his pay leaving $49.25. But if the leader agrees with the sideman that the latter is to "clear" $50, the tax is not deducted, but is paid by the leader. [Court's footnote.]

[9] See footnote 3. This is paid through the leader, as the union keeps little or no record of the musicians in whose behalf the leader pays the tax. [Court's footnote.]

members. We hold that the 10 percent surcharge payment violates § 302. [Emphasis supplied].

The unions filed a timely petition for rehearing addressed solely to the Court's disposition of this issue. The petition pointed out that the emphasized statements quoted above were squarely contrary to the findings of the District Court that the Local 802 tax and the travelling surcharge are imposed on the sideman's earnings, that the amounts are in fact deducted from the sideman's wages and finally, that the leader is collecting and paying the sideman's union obligations.[5] The unions also showed that the evidence cited by the District Court fully supported those findings, that these findings were undisputed by the respondent and that the Court of Appeals itself had stated that the facts were not contested. On May 17, 1963, the petition for rehearing was denied without comment.

REASONS FOR GRANTING THE WRIT

The judgment below presents a number of critical issues in the interpretation and application of § 302 of the Labor-Management Relations Act, as well as a matter of vital concern in the administration of the federal courts. Those issues are both novel and important and have a substantial impact upon the operation of all labor organizations. The reasons for the grant of certiorari to review and resolve those issues are most compelling.

Underlying all of these matters is the fact that § 302 of the Labor-Management Relations Act is a criminal statute carrying a penalty of up to one year's imprisonment and a fine of up to $10,000. While this is not a criminal case, the permanent injunction that issued was grounded on a finding of a violation of § 302 that would constitute a compelling legal precedent for any criminal prosecution.[6] The statutory conclusions reached in a civil case of this nature, as this Court has acknowledged, "would likewise apply to criminal cases." *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 296. Extreme care must therefore be taken in the review of such a case as this, for there "cannot be one construction for [a declaratory] judgment and another for the Department of Justice." *Ibid.*

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[5] The pertinent findings are set forth at n. 7, *infra.* And see App. B, pp. 16a-18a, *infra.*

1. The Court of Appeals' Judgment Represents Such a Departure From the Usual and Accepted Course of Judicial Proceedings as to Warrant the Exercise of This Court's Supervisory Powers

The opinion and judgment of the Court of Appeals in this case represent a flagrant abuse of its appellate functions. By premising its decision upon critical factual assumptions directly contrary to the express and uncontested findings of the District Court, the Court of Appeals has altered the whole nature of the case, beclouded the problems of statutory interpretation, and deprived petitioners of their day in court. The violation of § 302 of the Labor-Management Relations Act which the District Court found was not the violation discovered by the Court of Appeals. So egregious is this shift in the application of a criminal statute—a change that was not urged upon the Court of Appeals by any party—as to call for the exercise of this Court's supervisory power over the administration of justice in the lower federal courts.

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[6] Though the challenged by-laws had been openly enforced both before and after the enactment of § 302, there had been no prosecution or threat of prosecution prior to this litigation.

Section 302 of the Labor Management Relations Act in essence makes it criminally unlawful, with certain exceptions, for an employer to pay or deliver any money "to any representative of any of his employees who are employed in an industry affecting commerce." As presented to the District Court, the basic question was whether § 302 is violated when a union requires all of its leader members, regardless of whether they are employers or employees, to transmit to the union certain work taxes due from the leader and his fellow working members. At the heart of that issue were uncontested findings of the District Court,[7] supported by voluminous evidence, to the effect that the taxes on the sidemen's work were due from the sidemen them-

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[7] With respect to the travelling surcharge, Judge Levet found (App. B, p. 16a, *infra*, emphasis supplied):

> "17. Federation *members* who perform a 'miscellaneous out-of-town engagement' *are paid, but do not actually receive* in addition to their wages, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place. This additional amount is known as the 'traveling surcharge.' (Pl. Ex. 11, Art. 15; Art. 16, § 1A; Art. 17, § 1.)
>
> 18. The leader *does not actually turn over the additional 10% to his sidemen* because Federation By-laws provide that the local in whose jurisdiction such engagement is performed must collect the travelling surcharge from the leader, who is a member of the Federation, and transmit such collection to the Federation. (Pl. Ex. 11, Art. 15, § 7.) If the local fails to collect the surcharge from the leader who is a member of the Federation, such leader must transmit the surcharge directly to the Federation. (Pl. Ex. 11, Art. 15, § 8.)
>
> 19. The provisions of Federation's By-laws relating to the traveling surcharge are applicable *without regard to whether the member of the Federation who pays, collects or transmits*

selves and payable out of their own earnings. The violation of § 302, as determined by the District Court, was thus one in terms of an employer-member performing the ministerial task of collecting from his fellow-members and transmitting to his union *taxes imposed directly on the wages of all performing members.*

It was in those terms that the issue was presented to the Court of Appeals. No contention was made that the District Court had erred in any of its basic findings of fact. Indeed, the Court of Appeals itself acknowledged that "the facts upon which Judge Levet based the permanent injunction are not contested on this appeal." 316 F. 2d at 547; App. A, p. 2a, *infra.*

But then the Court of Appeals proceeded to ignore those uncontested findings and to hold that, "In fact, the leader is not really collecting the tax and surcharge from the sidemen at all; he is actually paying the union out of his own share" and that "the leader is here required to pay further exactions on a basis entirely

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the traveling surcharge may for some purposes be deemed to be an employer or an employee. (Pl. Ex. 11, Art. 15, §§ 1-3.)"

With respect to the Local 802 tax, Judge Levet found (App. B, pp. 17a-18a, *infra*, emphasis supplied):

> "23. * * * The Membership Resolutions contained in said By-laws of Local 802 provide that the Local Tax is to be '*payable and collected from all members* * * * on all engagements based on the scale price therefor' (Pl. Ex. 12, p. 65; 29, p. 65) and the orchestra leader as a member of Local 802 is responsible for collecting and transmitting the Local Tax. (Pl. Ex. 12, p. 66; Arons, 442-443, 446, 512-514; Jaffee, 622-624)."

> "25. The Local 802 tax is imposed solely on members of Local 802 and no person not a member of Local 802 is under any obligation to pay, collect, or transmit the tax to Local 802. The membership obligation which requires members of Local 802 to pay, collect or transmit said Local Tax is unrelated to a member's status as an employer or an employee. (Pl. Ex. 12, pp. 65-67)."

different from that of other union members." On those factual misstatements, contradicted by the findings of the District Court and the record evidence, the Court of Appeals drastically altered the entire nature of the statutory violation. The Court of Appeals affirmed the injunction as though the District Court had found a violation in the action of an employer paying money out of his own pocket, when in truth the District Court had found that the money came from the earnings of all the performers.

The distinction between these two factual premises is both obvious and substantial, vitally affecting the arguments and considerations relevant to the applicability of § 302. The essence of the holding of the Second Circuit is that a *special* tax levied *only* against employer-members is prohibited by Section 302. Petitioners never challenged or had occasion to challenge that self-evident proposition. Clearly, § 302 cannot be evaded by the transparent device of making employers members of the union and describing a special assessment against them as a membership obligation. That, however, was not the question raised by the undisputed facts nor decided by Judge Levet. What the petitioners have challenged and now challenge,[8] is the wooden application of § 302 so as to prevent employers, who are lawfully and properly members of the union, from meeting obligations equally required of non-employer members. Since the vast majority of leaders are not employers even under the District Court's criteria, and the obligation to transmit is imposed equally on all member leaders, it is plain that the transmittal is performed solely as a union obligation.

So drastic was the appellate court's transmutation of the theory of the statutory violation underlying the injunction—a violation with criminal connotations—that a serious question of constitutional due process is raised. This Court has held in unequivocal terms that "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U.S. 196, 202. No less is that true where, as here, the validity of an injunction depends upon proof of a particular type of violation of a criminal statute. In that circumstance the enjoined individuals are entitled to have the violation supporting the injunction reviewed and assessed in light of "the case as it was tried and as the issues were determined in the trial court." *Ibid.* Here the Court of Appeals has "adjudicated rights without considering essential facts [as found by the District Court] in the light of the controlling law." Cf. *Maggio* v. *Zeitz*, 333 U.S. 56, 77.

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[8] See pp. 17-20, *infra*.

Even in the setting of a case having no criminal implications, this Court has granted review on allegations that a Court of Appeals "had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence." *Letulle* v. *Scofield*, 308 U.S. 415, 416.[9] Such appellate unfairness is destructive not only of petitioners' right to due process but impedes their right to seek review of important issues of federal statutory law in the light of the relevant facts as fully developed below.

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[9] See also, *General Utilities Co.* v. *Helvering*, 296 U.S. 200, 206-207, where this Court reversed a judgment of a court of appeals that had undertaken "to decide a question not properly raised" and that had "made an inference of fact directly in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever."

At the very least, the Court of Appeals misconceived its function under Rule 52(a), Federal Rules of Civil Procedure, by failing to accept the District Court's findings that the work taxes were imposed on the sidemen directly and were paid out of their wages; such findings could be ignored only if the appellate court had found (which it did not) that the findings were "clearly erroneous." This violation of Rule 52 (a) with respect to critical factual determinations would itself warrant review, particularly in the context of a case such as this, involving a violation of a criminal statute. Cf. *McAllister* v. *United States*, 348 U.S. 19, 20; *Dayton Rubber Co.* v. *Cordovan Associates, Inc.*, 364 U.S. 299.[10]

But where the infraction of Rule 52(a) results in a destruction of meaningful appeal rights and violently alters the nature of the statutory violation as found by the trial court, more serious problems of due process and fair judical procedure come into play. At that point, the supervisory jurisdiction of this Court must assert itself in order to preserve the orderly administration of justice in the federal courts. Here, as in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 403-404, "Both the standards and ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied." See also *United States* v. *Johnston*, 268 U.S. 220, 227. Only the invocation of this Court's supervisory power can make certain that "the particular facts" to which § 302 has been applied have been properly discovered and assessed by the Court of Appeals in view of the statutory provisions.

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[10] The petition for certiorari in the *Dayton Rubber* case stated that "the sole question presented is whether the Court of Appeals erred in failing to apply to the finding above-mentioned [in the petition] the clearly erroneous test of Rule 52." Petition, p. 2, No. 324, October Term, 1960. This Court granted the petition and summarily vacated the judgment below for reconsideration in light of *Commissioner* v. *Duberstein*, 363 U.S. 278.

2. On the Basis of the Uncontested Findings of Fact of the District Court, An Important and Novel Issue Is Raised as to the Application of § 302

The plenary nature of this Court's certiorari jurisdiction makes it possible for this Court to ignore the unwarranted factual assumptions which premised the Court of Appeals decision and to review that court's judgment solely as an affirmance of the District Court's injunction grounded upon the uncontested findings of fact. "In relation to the District Court's findings we stand in the same position as the Court of Appeals." *McAllister* v. *United States*, 348 U.S. 19, 20.

So viewed, the judgment below presents a far-reaching and unprecedented application of a criminal statute. As applied to the facts of this case, § 302 has been interpreted in a manner (1) contrary to the intent of Congress (2) grossly destructive of the legitimate interests of labor organizations and (3) inconsistent with the freedom of association guaranteed by the First Amendment. These consequences stem directly from a mechanistic reading of the statute that ignores the repeated admonitions of this Court that any provision of this statute must be read in the context of its object and policy. *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 285; *Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 288.

The crux of this interpretation is that § 302 prohibits *any* payment by any employer to the representative of his employees even though (1) the employer is a union member, and (2) the payment represents a union obligation imposed equally on all members, be they employers or employees. As thus construed, the statute would ban not only the transmission of work dues involved in this case, but also ordinary dues payments by an employer-member. Petitioners urge that, properly interpreted, § 302 prohibits payments only when the employer acts *qua* employer, not when he acts as a union member.

As stated by this Court in *Arroyo* v. *United States*, 359 U.S. 419, 424-425, § 302 was designed "to deal with problems peculiar to collective bargaining" and was aimed "at practices which Congress considered inimical to the integrity of the collective bargaining process." These views were reaffirmed in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, in both the majority and dissenting opinions, *Id.* at 205 and 222. As Mr. Justice Brennan noted in his dissent, Congress was here concerned with such abuses of the collective bargaining process as "the payment by employers and the acceptance by employee representatives of unauthorized payments in the nature of bribes." 370 U.S. at 222. The collection and transmittal of union work taxes by a union member can hardly be considered "inimical to the integrity of the collective bargaining process" or "in the nature of bribes."

Nor is it conceivable that Congress, thoroughly familiar with the fact that many unions admit employers to membership,[11] intended to render criminal such nondiscriminatory membership obligations. Based on the commonplace that working employers are in economic competition with ordinary workers, this Court has long and consistently recognized that unions "often have a legitimate interest in soliciting self-employed entrepreneurs as members." *Los Angeles Meat Drivers' Union* v. *United States*, 371 U.S. 94, 103. See also *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91; *Bakery Drivers' Local* v. *Wohl*, 315 U.S. 769; *Teamsters Union* v. *Oliver*, 358 U.S. 283. And nowhere is such competition more obvious or more intense than in music.[12] If Cutler is an employer of musicians, it is only because he is a leader of musicians and he can only be such a leader if first and primarily he is and remains a musician. Unlike the employer of most craftsmen, a leader of musicians must possess and actively practice the skill of that craft. He has an obvious right to associate with fellow craftsmen in the same union. They have the equal right to associate with him. It is unthinkable that Congress intended to condition those equal rights on unequal obligations: that it criminally forbade an employer member from fulfilling the same union obligations required of any other member who works as a leader.[13]

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[11] See, e.g., § 8(b)(4)(A) of the Act, which clearly recognizes the right of employers voluntarily to join unions.

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[12] Cutler himself, who plays an instrument while conducting, competes with all members of Local 802 who play the same instrument. Moreover, conducting is itself a working function. The District Court found (App. B, p. 14a, *infra*) that leaders who are unable to conduct engagements they have solicited appoint other musicians to perform as leaders, and further (R. 159b) that petitioner Local 802 has an exchange floor in which members frequently exchange engagements as sidemen and leaders.

[13] In the Taft-Hartley Act Congress expressly denied the assertion of any power to regulate union admission policies or the relations between unions and their members. See § 8(b)(1)(A); *Machinists* v. *Gonzales*, 356 U.S. 617, 620. Section 302 may not be read to intrude federal power into a subject which Congress reserved to the states. See *Arroyo* v. *United States*, 359 U.S. 419.

The assumption that Congress in § 302 meant to impose such discriminatory conditions upon the union obligations of employer members of the petitioning unions has several far-reaching consequences:

(1) The employer members are given a preferred status and a "free ride" with respect to union financial obligations;

(2) The membership practices of those many unions that do admit to membership employers who work at the trade are rendered criminally questionable;[14]

(3) Serious constitutional problems are raised relative to the freedom of association guaranteed by the First Amendment, for if the freedom of choosing one's union associates is premised upon a governmentally-imposed discrimination then that freedom has indeed been circumscribed. See *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 263; *Thomas* v. *Collins*, 323 U.S. 516.

In order to avoid such absurd and possibly unconstitutional results, the literal terms of § 302 must be deemed inapplicable to financial transfers arising out of union membership obligations as to which the "employer" status of the payor is irrelevant. The refusal of the courts below to accomodate § 302 to the "legitimate interest" of the petitioning unions thus warrants the fullest consideration by this Court.

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[14] Employers are union members and work at the trade as truckers, printers, plumbers, barbers, and in countless other industries.

3. The Determination That Respondent Was an "Employer" for Purposes of the Labor Management Relations Act is in Conflict With the Uniform Course of Decisions in Other Courts of Appeals

The conclusion of the Court of Appeals below that respondent is an "employer" under the Act was predicated on an error of law which would alone require review because it is in conflict with the uniform course of decision in the Courts of Appeals.

Respondent as leader used the standard Form B Contract required by Union regulations[15] which provides as follows:

> "The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance."

This contract clearly gives to the purchaser of the music the right of control over the performance. The holding of the courts below that the leader is the employer despite the fact that the purchaser of the music is vested with the right of control is contrary to the deliberate choice of Congress, countless decisions of the courts of appeals, and the decisions of the National Labor Relations Board on this very question.

Ever since the enactment of the Labor Management Relations Act, the unvarying rule applied by the Board, and, in turn, approved by the courts, has been that "the test for determining whether the employer-employee relationship exists is right to control, not the actual exercise of control." *Labor Board* v. *Nu-Car Carriers*, 189 F. 2d 756, 759 (C.A. 3), *cert. denied*, 342 U.S. 919. Accord: *Labor Board* v. *Steinberg*, 182 F. 2d 850 (C.A. 5); *United Ins. Co.* v. *Labor Board*, 304 F. 2d 86 (C.A. 7); *Labor Board* v. *Keystone Floors, Inc.*, 306 F. 2d 560 (C.A. 3). Moreover, the Board, in a series of decisions involving musicians, has held that by virtue of the Form B Contract the purchaser of the music is the employer. *Independent Motion Picture Producers' Assoc.*, 123 NLRB 1942; *Edward Small Productions, Inc.*, 127 NLRB 283; *Batjac Enterprises, Inc.*, 126 NLRB 1281; *The Alamo Co.*, 129 NLRB 1093.

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[15] Article 13, Section 33 of the Federation By-laws provides: "Members of the A.F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A.F. of M. Penalty: Fine of not less than $100.00."

The courts below relied on *Carroll* v. *AFM*, 295 F. 2d 484 (C.A. 2), which in turn had cited *Cutler* v. *United States*, 180 F. Supp. 360 (Ct. Cl.). In the latter case the Court held that the present respondent was liable as employer for social security payments on behalf of the musicians notwithstanding his use of the Form B Contract. The Court of Claims based its decision on the controlling precedent of *Bartels* v. *Birmingham*, 332 U.S. 126, 130, where it was held "that economic reality rather than right of control is the test which determines liability for employment taxes under the Social Security Act." But the economic reality test, whatever its validity for purposes of the Social Security Act,[16] was expressly repudiated for purposes of the Labor Management Relations Act when that Act was amended by Congress in 1947. 1 *Legislative History of the Labor-Management Relations Act, 1947*, pp. 536-537 (G.P.O., 1948); House Conference Rept. No. 510, on H.R. 3020, 80th Cong., 1st Sess., pp. 32-33. In 1959, when Congress amended § 302, this limited definition of "employer" for purposes of § 302 was deliberately retained, although a broader definition was adopted for other purposes. See Labor-Management Reporting and Disclosure Act of 1959, §§ 3, 3(e) and 505; 73 Stat. 520, 537.

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[16] The terms "employer" and "employee" lack a fixed content and vary according to their legal context. See *United States* v. *American Trucking Assoc.*, 310 U.S. 534, 545, n. 29.

The Court of Appeals said (App. A, p. 5a, *infra*): "We find the designation in the Form B Contract to be a self-serving subterfuge[17] which is not entitled to any weight." The District Court had made no findings to support this assertion nor is there any evidence in the record that Form B does not give or was not intended to give the right of control to the purchaser of the music. On the contrary, as the record makes abundantly clear, there are many purchasers of music who actively exercise this right of control (e.g., *Carroll* R. 328a-335a).

The decision below reopens an issue which Congress thought it had closed in adopting the right-of-control test in 1947 and which it kept closed when it consciously retained that test for purposes of § 302 in the 1959 amendments. Hitherto, the Courts of Appeals as well as the Labor Board have consistently followed this standard. Identification of the "employer" is critical in many contexts under the Labor-Management Relations Act. The decision below thus introduces confusion and uncertainty into federal labor law and is in such sharp conflict with the decisions of other circuits as to call for review by this Court.

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[17] This unwarranted and cavalier description ignores the fact that the Form B contract was adopted long before the enactment of § 302 and ". . . with the approval of the Commissioner of Internal Revenue . . ." *Bartels* v. *Birmingham, supra,* at p. 132.

4. The Decision Below That the "Single Engagement Field" Is "An Industry Affecting Commerce" Constitutes An Unwarranted Extension of the Federal Commerce Power in Direct Conflict With the Principles Established By This Court

The decision below that the respondent Cutler, as an orchestra leader who occasionally plays engagements outside the State of New York, is in an industry affecting commerce within the scope of the Labor-Management Relations Act directly conflicts with the basic principles recognized by this Court in defining and applying the Commerce Clause of the Constitution.

The Act, of course, represents an exercise by Congress of its full constitutional power over interstate commerce. *Labor Board* v. *Fainblatt*, 306 U.S. 601, 607. But it is no less obvious that there are ultimate and outer limits to the constitutional concept of interstate commerce. As interpreted by this Court the Commerce Clause does not extend to those transactions between states which are so "few, sporadic and incidental," *United States* v. *Oregon Medical Society*, 343 U.S. 326, 339, or which are "so insignificant," *Industrial Association* v. *United States*, 268 U.S. 64, 84, as to justify "that to which courts would apply the maxim de minimis," *Labor Board* v. *Fainblatt*, *supra*, 607.[18]

These necessary limitations on the scope of the federal commerce power reflect the fact that even the "interpenetrations of modern society have not wiped out state lines" and that the Commerce Clause "cannot justify absorption of legislative power by the United States over every activity." *Polish National Alliance* v. *Labor Board*, 322 U.S. 643, 650. It is precisely because the decision below totally ignores those basic truths by extending the commerce power to a level far below the de minimis limitations established by this Court that review of this case becomes essential.

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[18] See also *Second Employers' Liability Cases*, 223 U.S. 1, 47 (the Commerce Clause "does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.").

The District Court findings upon which rests the invocation of the federal commerce power in this case were but two in number:

(1) The finding that the regulations and by-laws of the Federation and Local 802 contemplate travel by orchestras in the single engagement field and demonstrate that these unions "represent members (both leaders and sidemen) in the single engagement field whose engagements require a constant continuous stream of trade and commerce between the States of the United States." App. B, pp. 12a-13a, *infra.*[19]

(2) The finding that respondent Cutler "fulfills engagements outside the State of New York, in which he usually operates and in which his principal office

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[19] The by-law provisions said to demonstrate such "stream of trade or commerce between the States" related to the 10% traveling surcharge, traveling members' obligations, mileage charges; steamship performances, "etc." R. 195b. But those provisions, as set forth by the District Court, R. 193b-194b, make reference only to "traveling" or "out-of-town" engagements and make no specific mention of "interstate" engagements. These provisions do not relate to the crossing of state lines but rather to local union jurisdictional lines (and there are usually several locals within one state) or are based strictly on miles traveled, which may be within a single union jurisdiction and within one state. Thus, for example, the mileage provisions on which Judge Levet expressly relied in making the identical commerce finding in granting the preliminary injunction (R. 161b) apply to all distant engagements without regard to whether they are performed in or out of New York State.

is located," App. B, p. 13a, *infra*, and that his business involves, in addition to actual leading of his orchestra, "the negotiating and signing of engagement contracts and the transporting of sidemen, musical instruments and other required materials between states of the United States," App. B, p. 24a, *infra*.

Such findings only add up to the truisms that some musicians negotiate and perform engagements in more states than one, and that the petitioning unions have rules pertaining to traveling members. There is not the slightest indication or finding that these rules were designed to reflect "a constant continuous stream" of interstate traveling engagements or that respondent Cutler himself did anything more substantial than negotiate and fulfill some engagements outside the State of New York.[20] To infer from this record that the single engagement field is an industry affecting commerce within the scope of the Commerce Clause is to premise a constitutional conclusion upon a shadow of a shade of the requisite findings. For aught that appears in this record, the federal commerce power has been asserted on nothing more than the sporadic, the incidental and the insignificant—factors which are beyond the pale of the Commerce Clause.

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[20] That "sporadic and incidental" interstate mailings do not amount to interstate commerce was decided in *United States* v. *Oregon Medical Society*, 343 U.S. 326, 338-339. And the mere movement of the leader and the other musicians across state lines on an unspecified number of occasions no more partakes of interstate commerce than the interstate movement of patients which was held insufficient to bring the Sherman Act into play in *Spears Free Clinic* v. *Cleere*, 197 F.2d 125 (C.A. 10); *Riggall* v. *Washington County Medical Society*, 249 F. 2d 266 (C.A. 8), cert. denied, 355 U.S. 954; and *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167 (C.A. 8), cert. denied, 361 U.S. 884.

The fact that Cutler negotiates and fulfills an unspecified number of engagements outside the State of New York is not the equivalent of the extensive activities of an interstate nature which alone justified the application of the Sherman Act in *United States* v. *Shubert,* 348 U.S. 222, and *United States* v. *International Boxing Club,* 348 U.S. 236, cases which the courts below relied upon in the instant case. Both those decisions involved local affairs—the showing of a motion picture and a boxing match—similar in nature to the local affair in this proceeding, the performance of a single musical engagement. But it required a four-page appendix in the *Shubert* case (348 U.S. at 231-235) and a three-page appendix in the *International Boxing* case (348 U.S. at 245-248) to detail the interstate activities and implications arising out of the businesses of promoting the respective local affairs. And the Court noted in the *International Boxing* case, 348 U.S. at 241, that it was there enough "to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television and motion picture rights."

In sharp contrast, Cutler's business with respect to local single musical engagements has not been found to have any appreciable interstate characteristics. The engagement itself is necessarily local; and interstate commerce has been found only by virtue of some indecisive by-laws and an unspecified number of interstate transactions by one individual.[21] The de minimis rule recognized by this Court forbids any conclusion that an "industry affecting commerce" has been established for purposes of the Commerce Clause.

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[21] There is, of course, no claim or finding that the local engagements had any such economic interrelationships or any such impact upon interstate commerce as to warrant the application of the

Only by indulging in "scholastic reasoning," against which this Court admonished in *Polish National Alliance*, 322 U.S. at 650, can such sporadic and indefinite interstate promotional activities be said to sustain the exercise of the federal commerce power so as to regulate the performance of music at weddings, confirmations and dances. For once it is acknowledged that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business," *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 231, the insubstantiality of grounding the exercise of federal power on the trivial interstate factors in this case become clear. Because the court below so completely ignored the practical concepts of interstate commerce, because it permitted an unwarranted extension of federal power over essentially local affairs, and because it flouted the de minimis principle embedded in the Commerce Clause, review by this Court becomes appropriate.

The Commerce Clause was never designed to subject to federal control every profession or trade whose operation involves sporadic and incidental interstate transactions. The lawyer, the doctor, the musician and the

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Commerce Clause under the principles recognized in *Wickard* v. *Filburn*, 317 U.S. 111.

There is no finding, and it has not been contended, that the particular Federation regulations which deal with travel place such a burden on interstate commerce that they would be subject to federal regulation. Even if such an argument were to be made and sustained, it could not justify federal regulation of local union taxes such as the 1½% tax whose operation was also enjoined by the court below, since that tax by definition applies only to members of Local 802 performing within that Local's jurisdiction.

teacher—absent some substantial interstate promotional activities—remain free of federal control in their incidental and sporadic travel and communication across state lines in furtherance of their professions. The inroad which the decision below has made upon that vital proposition underlying our federal system urgently calls for review and redress by this Court.

CONCLUSION

By reason of the foregoing, this petition for certiorari should be granted.

Respectfully submitted,

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September 16, 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 283 — October Term, 1962

(Argued March 19, 1963 Decided April 30, 1963)

Docket No. 27946

BEN CUTLER, DAN TERRY, RALPH FLANAGAN, MARTY LEVITT, VIC ASH, CLAUDE GARREAU (d/b/a Allen Meritt), and ANGIE BOND, ET AL.,

Plaintiffs-Appellees,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802,

Defendants-Appellants.

Before: LUMBARD, *Chief Judge*, FRIENDLY and KAUFMAN, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard H. Levet, Jr., permanently enjoining the defendants from demanding certain union "taxes" and "traveling surcharges" as prohibted by § 302 of the Labor Management Relations Act, as amended, 29 U. S. C. § 186.

Affirmed.

GODFREY P. SCHMIDT, New York, N. Y., for *plaintiffs-appellees*.

EMANUEL DANNETT, New York, N. Y. (McGoldrick, Dannett, Horowitz & Golub, New York, N. Y., Herbert D. Schwartzman, Eugene Mittleman, and Jerome H. Adler, New York, N. Y., Henry Kaiser and George Kaufmann, Washington, D. C., on the brief) *for defendant-appellant American Federation of Musicians of the United States and Canada*.

DAVID I. ASHE, Ashe & Rifkin, New York, N. Y., on the brief, *for defendant-appellant Associated Musicians of Greater New York, Local 802*.

LUMBARD, *Chief Judge:*

The American Federation of Musicians of the United States and Canada and the Associated Musicians of Greater New York, Local 802 appeal from a judgment of the District Court for the Southern District of New York which permanently enjoined the defendant unions from collecting from Ben Cutler, an orchestra leader member of said Local, the 1½ percent tax or the 10 percent traveling surcharge imposed respectively by the Local's by-laws and the Federation's constitution. 211 F. Supp. 433 (S. D. N. Y. 1962). This appeal questions Judge Levet's holding that under § 302 of the Labor-Management Relations Act, 29 U. S. C. § 186, the payment of the tax and surcharge by Cutler is illegal and such payment may not be demanded of Cutler by the defendant unions. We affirm.[1]

The facts upon which Judge Levet based the permanent injunction are not contested on this appeal.

Cutler, a member of the defendant unions, is an orchestra leader engaged in the so-called "single engagement" field. In other words, he leads orchestras which perform at weddings, dances, sports events and the like; these engagements always being for less than one week.

Local 802 imposes a Local Tax of 1½ percent of the wage scales set by the union.[2] The union's by-laws require the leader to transmit to the local the ":Taxes" which he is to deduct from his own wages and the wages of the other orchestra members who are known as sidemen. No sideman has signed a written authorization for such a deduction. The 1½ percent tax is not collected and transmitted if the orchestra performs outside of the jurisdiction of Local 802 which includes New York City, Nassau and Suffolk counties. But in such case, the leader is obligated, under the Federation's rules, to pay to the Federation an amount equal to 10 percent of the scale set by the local which has jurisdiction over the areas in which the performance is rendered.[3] The 10 percent is not deducted from the wages of the sidemen or the leader but is charged to the purchaser of the musical performance. Under the rules of Local 802 and the Federation, the leader is under no obligation to collect and pay over the 1½ percent or the 10 percent unless he is a member of the union.

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[1] The unions also appeal from the granting of a preliminary injunction in favor of over 70 other orchestra leaders. Judge Levet found that those leaders perform "substantially in the same fashion" as Cutler. This finding is not clearly erroneous, and since we hold the tax and surcharge illegal, we affirm the granting of the preliminary injunction as to the 70 other leaders.

[2] Scale is the minimum which each performer may be paid for a performance within the jurisdiction of each local. The rule within the jurisdiction of Local 802 is that the leader must be paid at least twice scale plus eight percent of the total scale wages of the entire orchestra.

Each orchestra leader in the single engagement field generally plays an instrument himself. Ninety-eight percent of the performers who act as leaders on some occasions act as sidemen on others. Cutler is one of the two percent who always act as leaders. The leader negotiates contracts with purchasers of performances. The contracts are for a lump sum and do not itemize the distribution of that sum.[4] The leader distributes an amount equal at least to the union scale to each sideman, makes the required payments to the union, and keeps the remainder for himself.

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[3] The distribution of the ten percent is as follows:

> Four-tenths goes to the local in whose jurisdiction the engagement was played; four-tenths is retained by the Federation; two-tenths is paid to the members who played the engagement.

[4] The Local's by-laws require that such contracts must be approved by the Local and the price must include at least the scale for each performer and double scale plus eight percent for the leader. See footnote 2, *supra*.

Cutler brought this action on July 20, 1962 to restrain collection of the wage tax and the 10 percent surcharge. By agreement of the parties, Judge Levet used affidavits and the record in *Carroll* v. *Associated Musicians of Greater New York*,[5] wherein Cutler was a witness, as the source of the facts in this case and issued a preliminary injunction against the unions on October 17, 1962. Following further stipulation as to the use of those sources, Judge Levet made the injunction in favor of Cutler permanent on November 14, 1962, and from that judgment the defendants appeal.

Judge Levet found that Cutler, an orchestra leader in the single engagement field, is an employer within the meaning of the statute and that as such he may not be required to pay over to the unions the taxes and surcharges here involved. We agree. Section 302 of the Labor-Management Relations Act, as amended, 29 U. S. C. § 186, prohibits unions from demanding or employers from making payments to unions representing his employees unless there is a written authorization for certain deductions from wages, and reads in pertinent part as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
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> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
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> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the

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[5] The appeal in the *Carroll* case is decided this day. See —— F. 2d —— (2 Cir. 1963).

> employees of such employer who are employed in an industry affecting commerce; * * *
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

The appellants argue that the provision of the statute which prohibits payment by the employer to any representatives of his employees is not applicable here because Cutler is not an employer. They refer us to the Form B Contract, in use since 1941, which designates the purchaser of the performance as the employer of the musicians. In actual practice, however, the leader in the single engagement field has all effective control of the orchestra;[6] he hires the sidemen, decides how much is to be charged for the performance and what share is to be allocated to each sideman, subject of course to union minimum charges. He also pays all the expenses of each performance, workmen's compensation, insurance premiums, withholding taxes and other taxes. We find the designation in the Form B Contract to be a self-serving subterfuge which is not entitled to any weight. See *Carroll* v. *American Fed. of Musicians*, 295 F. 2d 484, 486 (2 Cir. 1961); *cf. Cutler* v. *United States*, 180 F. Supp. 360, 362 (Ct. Claims 1960). We agree with Judge Levet that Cutler is an "employer" for the purposes of § 302.

The appellants urge, however, that even if Cutler is an employer, he is also a union member and as such, he has certain duties to the union, including paying over the charges involved in this action. In other words, the leader's membership in the union enables the union to impose duties upon him which are inconsistent with what is prohibited him as an employer under § 302. Appellants point out that non-members are not required by the union to pay over the taxes.

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[6] We need not be concerned with those occasions when the father of the bride, at the height of his exhilaration, proceeds to lead the orchestra.

We do not agree that the leader's membership in the union immunizes him from the limitations which § 302 imposes upon him because of his being an employer. He is not merely performing a ministerial task for the union, that is, collecting and paying over his and the sidemen's dues and exactions. In fact, the leader is not really collecting the tax and surcharge from the sidemen at all; he is actually paying the union out of his own share. It is true that union regulations require the 1½ percent to be deducted from the scale wage. But the actual amount paid to sidemen is often above scale, dependent entirely upon bargaining between the leader and each sideman.[7] The requirement that the leader turn over the tax is undoubtedly considered in arriving at the payment, obviating the need for any deduction.[8] It is clear that the 10 percent surcharge is an exaction from the leader's share. The amount is never deducted from the sidemen's wages. In fact two percent of the scale wage is ultimately paid over to the sidemen.[9]

The unions argue that leaders may become members and pay union exactions even if they are self-employed, because they are in wage or job competition, or economic interrelationship with other union members, see *Los Angeles*

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[7] There is no collective bargaining in this industry.

[8] For example, if the union scale were $50, and the sideman were paid the scale wage, $.75 would be deducted from his pay leaving $49.25. But if the leader agrees with the sideman that the latter is to "clear" $50, the tax is not deducted, but is paid by the leader.

[9] See footnote 3. This is paid through the leader, as the union keeps little or no record of the musicians in whose behalf the leader pays the tax.

Meat & Provision Drivers Union v. *United States,* 371 U. S. 94, 103 (1962). This is true so far as the payment of dues is concerned. But the leader is here required to pay further exactions on a basis entirely different from that of other union members. We hold that the unions' demand for the 1½ percent wage tax and the 10 percent surcharge payment violates § 302.

Finally, appellants contend that the impositions did not relate to "an industry affecting commerce." Judge Levet found that the single engagement field is an industry affecting commerce, 211 F. Supp. at 442, and we agree for the reasons he stated there. See *Carroll* v. *American Fed. of Musicians,* 295 F. 2d 484, 487 (2 Cir. 1961).

The judgment of the district court is affirmed.

APPENDIX B

Opinion, Finding of Fact, and Conclusions of Law of Levet, J., Granting Final Judgment as to Plaintiff Ben Cutler and the Class Action

(Tr. pp. 536-570)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

Levet, D. J.

This action was originally begun on July 20, 1962 by the individual plaintiffs Ben Cutler, Dan Terry, Ralph Flanagan, Marty Levitt, Vic Ash, Claude Garreau (d/b/a Allen Meritt) and Angie Bond in their own behalf and as representatives of a class of all orchestra leaders who are either employers or self-employed persons. On October 16, 1962 a number of other parties were permitted to intervene as co-plaintiffs.

The complaint states a single cause of action for certain declaratory and injunctive relief alleging that the defendants are violating Section 302(a), (b) and (c) of the Labor-Management Relations Act, as amended, 29 USC 186, by requiring certain payments by "employers" to the defendant unions.

Specifically, this action seeks:

(1) A declaratory judgment of illegality respecting (a) a certain so-called "local tax" of 1½% heretofore imposed and collected from plaintiff and other orchestra leaders and self-employed musicians who are members of Local 802, and (b) a so-called "traveling surcharge" of 10% imposed and collected by the defendant Federation for all musical engagements outside the home local of the sidemen or self-employed musicians involved; both alleged to be in violation of Section 302 of the Labor-Management Relations Act of 1947, as amended.

(2) Temporary and permanent injunctions (a) forbidding defendants, their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them (who receive actual notice of such injunction order by personal service or otherwise) from imposing or collecting or from attempting in any way to impose or collect the said "local tax" and the said 10% "traveling surcharge"; and (b) visiting upon plaintiffs, because of this action or because of plaintiffs' refusal to pay the said "local tax" or the said 10% "traveling surcharge," penalties and reprisals.

The present action is part of a controversy between the defendant unions and certain orchestra leaders. It has precipitated four actions in this court in addition to the present one (viz., 60 Civil 1169, 2939, 4025 and 4926). The five actions involve two basic charges against the defendant unions. First, that the defendant unions have violated Section 302 of the Labor-Management Relations Act, as amended, 29 USC § 186, and, second, that the defendant unions have conspired together with other orchestra leaders to violate the federal anti-trust laws.

Two of the actions (60 Civil 1169 and 60 Civil 4025) were brought by Joseph Carroll, Charles Peterson and Orchestra Leaders of Greater New York (hereinafter "OLGNY") on their own behalf and for an alleged class for violation of Section 302 (hereinafter the "Carroll actions" [sic]). These actions were tried before me on March 5 to 9, 1962.

The Carroll actions dealt, as does this action, with the legality of the local tax and the traveling surcharge which are required to be paid to the unions under their By-Laws. In an Opinion, Findings of Fact and Conclusions of Law dated June 25, 1962, I dismissed the complaints on the ground that Carroll and Peterson, being no longer members of the union, did not have standing to secure the relief sought.

In this case, the plaintiffs moved for a preliminary injunction on July 20, 1962, by order to show cause. On September 27, 1962, I rendered an Opinion with Findings of Fact and Conclusions of Law directing the entrance of a preliminary injunction against the defendants inuring to all of the then plaintiffs. An order to this effect was signed on October 16, 1962.

Thereafter and by stipulation dated October 24, 1962 and confirmed by order dated October 25, 1962, the attorney for the plaintiffs in this action and the attorneys for the two above-mentioned defendants agreed that, upon the pleadings in this case; the transcript of the testimony and the exhibits in the trial in Carroll et al v. Associated Musicians of Greater New York, et al, 60 Civil 1169, and in Carroll et al v. Associated Musicians of Greater New York, et al, 60 Civil 4025, which took place on March 5 through 9, 1962; the affidavits and exhibits submitted by the plaintiffs in support of their motion for preliminary injunction dated July 20, 1962, the affidavits and exhibits submitted by the defendants in opposition thereto; and upon all other proceedings heretofore had herein, this court shall make findings of fact and conclusions of law and shall direct the entry of appropriate judgment but solely with respect to (a) the cause of action asserted by the plaintiff Ben Cutler, and (b) the class action alleged in the complaint herein.

Based on the record as stipulated, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. THE PARTIES

1. Plaintiff Ben Cutler at all times relevant herein was and now is an orchestra leader engaged in the so-called "single engagement" field and at the commencement of this action was and now is a member of defendants American Federation of Musicians of the United States and Canada ("Federation") and Associated Musicians of Greater New York Local 802 ("Local 802").

2. Defendant Federation is a labor union or labor organization within the meaning of the Labor-Management Reporting and Disclosure Act of 1959. It is affiliated with the AFL-CIO and its principal office and place of business is at 425 Park Avenue, New York, N. Y. It is an international union comprising 683 local unions, including defendant Local 802, and is located throughout the United States and Canada. (Ballard, 665, 667)[1]

3. Defendant Local 802 is a labor organization within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 and is affiliated with the defendant Federation. Its principal office and place of business is located

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[1] All references are to the testimony and exhibits in the trial of Carroll actions, 60 Civil 1169 and 60 Civil 4025, except as otherwise noted.

at 261 West 52 Street, New York 19, N. Y. Local 802 represents, among others, members who are leaders and sidemen[2] in the single engagement field. Under Federation By-Laws, the territorial jurisdiction of Local 802 consists of the five boroughs of New York City and the Counties of Nassau and Suffolk. (Pl. Ex. 12, Section 6, p. 5; Cutler, 80-81; Arons, 453)[3]

4. Membership in a local affiliated with Federation implies membership in the Federation. (Pl. Ex. 29, Sections 10 and 11, p. 34; Arons, 430)

II. THE SINGLE ENGAGEMENT INDUSTRY

5. A single engagement is defined in the By-Laws of defendant Local 802 (Pl. Ex. 29, Art. X, p. 63) and is a musical performance generally for one night but always for less than one week, including, but not limited to, such types of functions as weddings, commencements, debutante parties, fashion shows, sports events, college or high school dances or other social events. (Cutler, 69, 242-243; Arons, 438, 457; Pl. Ex. 53, p. 39).

6. In the single engagement field, defendant Local 802, as a matter of policy does not bargain collectively with member orchestra leaders. (Pl. Ex. 53, pp. 45, 68; Pl. Ex. 56, p. 110; see also Jaffe, 581-582)

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[2] The term "sidemen" refers to musicians who perform in a band or orchestra but does not include the leader or conductor of said band or orchestra.

[3] The defendant in paragraphs 14-17 of the answer denies that the Constitution and By-Laws of both the Federation and Local 802, which were annexed to the complaint in this action as Exhibits A and B, are the most recent. An examination of the most recent Constitution and By-Laws of both defendants which were introduced in the Carroll actions 60 Civil 1169 and 60 Civil 4025 shows that they contain provisions identical to those contained in the Exhibits A and B annexed to the complaint. No allegation is made that the provisions in the most recent Constitution and By-Laws differ from those of the earlier ones.

7. Travel by orchestras in the single engagement field composed of members of defendant unions is contemplated by defendant unions and regulated by them in various ways. Thus, among others, Section 2 of Article 17 of the By-Laws of the Federation (Pl. Ex. 11, p. 114) provides:

> "If the Local Union in whose jurisdiction an engagement is to be played has a Local law requiring its members to file a written contract with the Local prior to each engagement, the traveling member or the traveling leader must so file such contract with such Local Union."

Section 13 of Article 15 (Pl. Ex. 11, p. 104) provides:

> "An orchestra playing miscellaneous out-of-town engagements [i. e., single engagements involving travel] in the jurisdiction of a Local which maintains a higher price than their own Local, must charge the price of the Local in whose jurisdiction they are playing, plus 10% of the price of the Local wherein playing."

Section 14 of Article 16 (Pl. Ex. 11, p. 109) provides:

> "For all traveling engagements the employer is required to at all times make payment for services in money of the country from which the engagement emanates, unless an amount in excess of the stipulated salary sufficient to cover the rate of exchange is paid."

Similarly, Rule 4 of defendant Local 802's Price List (Pl. Ex. 7, p. 23) in pertinent part provides:

> "Rule 4. For all single engagements beyond the limits of Greater New York (except engagements on Long Island covered below) or the jurisdiction of Jersey City Local, No. 526, in addition to railroad

fare, board and lodging, the following extra charges shall be made:

"If within 25 miles, per man	$3.00
"If within 50 miles, per man	5.00
"If within 75 miles, per man	7.00
"For each additional 25 miles or less, extra, per man	2.00."

In short, defendants' own publications and practices, such as their 10% traveling surcharge, their rules and regulations pertaining to traveling members, their mileage charges, their regulations pertaining to steamship performances, etc., demonstrate that defendant unions represent members (both leaders and sidemen) in a single engagement field whose engagements require a constant continuous stream of trade and commerce between the States of the United States. (Pl. Exs. 7, 11, Arts. 15, 16, 26, 27; Deft. Exs. AE, AL, AQ, AR, AR1.)

8. Cutler fulfills engagements outside the State of New York, in which he usually operates and in which his principal office is located. (See Cutler 154-155, 185.)

9. Defendant unions require their members to use a form of contract known as the "Form B Contract," which contract designates the purchaser of music as the "employer" and the musicians, including the leader, as "employees." (Pl. Ex. 13; Ballard, 695-696, 698; Cutler, 136; Arons, 471) The Form B Contract or, at least, the details of such contract must be filed with Local 802 by member orchestra leaders performing within the jurisdiction of Local 802 and such contracts are not deemed effective unless approved by Local 802. (Pl. Ex. 53, p. 55; Pl. Ex. 56, pp. 127-128; Arons, 455-456) Any member failing to use said Form B Contract is subject to penalty by the Federation. (Pl. Ex. 11, Art. 13, § 33; Ballard, 697-699)

10. The purchaser of music is not in fact the employer of the sidemen and of the leader and, consequently, the

purchaser is sometimes unwilling to assume the responsibility of an employer. (Cutler, 170ff; Ballard, 722-724) Accordingly, the Form B Contract as prescribed by defendant unions has in the past been subject to exception by rider which exonerates the purchaser who signs it from certain responsibilities as an employer, such as the withholding of taxes and the making of customary employer contributions, such as social security. (Pl. Exs. 25 p. 7, 79, 93 pp. 12-13)

11. Plaintiff Cutler devotes his full time to his profession as leader. He never serves as sideman and his relationship with his clients or customers, who are normally engaged in other businesses or professions than his, is transient in nature.

12. In the course of his business, plaintiff Cutler, among other things, customarily does the following:

(a) Organizes his own bands (Cutler, 72);

(b) Maintains his own offices where he employs steady and/or part-time employees (Cutler 77-78);

(c) Acquires business as a result of his own contacts, reputation, and personal solicitations (Cutler, 78-79);

(d) Engages in and pays for advertising (Cutler, 80-85, 87, 127-128, 261-262; Peterson, 360) and prominently displays his name wherever his engagements are played, thus indicating that the orchestra is the Ben Cutler Orchestra (Cutler, 116, 260, 347);

(e) Negotiates and signs engagement contracts with purchasers of music (Cutler, 91);

(f) Generally leads or conducts his own orchestra (Cutler, 77) and appoints subleaders to lead when he does not do so himself (Cutler, 73);

(g) Decides on how his orchestras are to render their pieces; chooses the tempo and decides on the dynamics, tone coloring, volume and the type of syncopation, if any, which is to characterize the performance of his orchestras (Cutler, 117-118);

(h) Decides, subject to union minimum requirements, on the number (Cutler, 91, 95) and qualifications of sidemen who are to play in his orchestras (Cutler, 72, 91);

(i) Calls for rehearsals and trains his orchestras if he deems it necessary (Cutler, 129, 130); and

(j) Corrects sidemen during a performance if necessary and otherwise disciplines or discharges those who are unsatisfactory (Cutler, 121-122).

13. There is no evidence that purchasers of music contributed, or had the ability to contribute, musical skill or direction which would give them genuine or effective control over the individual methods employed by Cutler and his orchestras in rendering performances.

14. Cutler pays all expenses connected with the performance of his orchestras, including, among other things, subject to union minimums, sidemen's salaries (Cutler, 91-92); uniforms, if any, worn by his sidemen during engagements (Cutler, 111); mileage fees, cartage fees, food and lodging for his orchestras (Cutler 111-115); sheet music racks; and special arrangements of music to be played by his orchestras. (Cutler, 119, 129-130)

15. Cutler, in connection with the employment of his sidemen, withholds and pays over to the appropriate governmental agencies federal and state withholding taxes and social security. In addition, he pays workmen's compensation and disability insurance on behalf of his sidemen. These items are paid because, under the particular governmental regulations involved, orchestra leaders are regarded as "employers." (Cutler, 125-126, 138)

III. Traveling Surcharge

16. Art. 15 of the By-Laws of the Federation provides a definition of "Miscellaneous Out-of-Town Engagements," which corresponds in duration with Local 802's definition of "single engagements" (see Finding of Fact No. 5). (Compare Pl. Ex. 11, Art. 15 §§ 1 and 2, with Pl. Ex. 29, Art. X, p. 63)

17. Federation members who perform a "miscellaneous out-of-town engagement" are paid, but do not actually receive, in addition to their wages, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place. This additional amount is known as the "traveling surcharge." (Pl. Ex. 11, Art. 15; Art. 16, § 1A; Art. 17 § 1)

18. The leader does not actually turn over the additional 10% to his sidemen because Federation By-Laws provide that the local in whose jurisdiction such engagement is performed must collect the traveling surcharge from the leader, who is a member of the Federation, and transmit such collection to the Federation. (Pl. Ex. 11, Art 15, § 7) If the local fails to collect the surcharge from the leader, who is a member of the Federation, such leader must transmit the surcharge directly to the Federation. (Pl. Ex. 11, Art. 15, § 8)

19. The provisions of Federation's By-Laws relating to the traveling surcharge are applicable without regard to whether the member of the Federation who pays, collects or transmits the traveling surcharge may for some purposes be deemed to be an employer or an employee. (Pl. Ex. 11, Art. 15, §§ 1-3)

20. Defendants never obtain from any of the member sidemen involved any writing authorizing deduction of any part of the 10% traveling surcharge from their wages. (Pl. Ex. 53, pp. 67-68; Cutler, 153, 208; Arons, 443, 515, 529; statements of counsel, 760-762)

21. Defendant Federation retains 4/10ths of the traveling surcharge. The remaining 6/10ths is distributed as follows:

2/10ths is returned to the leader who initially transmitted it for the purpose of his undertaking the distribution and return of this amount to the individual members of the Federation, i.e., the sidemen, who played the particular engagement; and

4/10ths is returned to the local in whose jurisdiction the engagement was played. (Pl. Ex. 11, Art. 15, § 7; see also Deft. Exs. V, p. 345; AF; AG)

22. Members of the Federation, including member orchestra leaders, are subject to disciplinary action by the Federation for violation of the provisions of the By-Laws, including the provisions concerning the traveling surcharge. (Pl. Ex. 11, Art. 7, § 6; Art. 15, § 15; see also Jaffe, 650)

IV. LOCAL 802 TAX

23. Defendant Local 802 imposes a "Local Tax," as defined or authorized in its By-Laws (pp. 65-66) and in Article 16, Section 26, of the By-Laws of the Federation, as well as in certain standing resolutions having the force and effect of By-Laws of Local 802. (Pl. Exs. 12, pp. 64-66; 29, pp. 65-66; Arons, 440-441, 446)

The Membership Resolutions contained in said By-Laws of Local 802 provide that the Local Tax is to be "payable and collected from all members * * * on all engagements based on the scale price therefor" (Pl. Exs. 12, p. 65; 29, p. 65) and the orchestra leader as a member of Local 802 is responsible for collecting and transmitting the Local Tax. (Pl. Ex. 12, p. 66; Arons, 442-443, 446, 512-514; Jaffe, 622-624)

24. Defendants never used, or obtained from the member sidemen involved, any writing authorizing deduction of Local Taxes from the wages of the sidemen. (Cutler, 153,

208; Arons, 443, 514-515, 529; stipulation of counsel, 760, 762)

25. The Local 802 tax is imposed solely on members of Local 802 and no person not a member of Local 802 is under any obligation to pay, collect, or transmit the tax to Local 802. The membership obligation which requires members of the Local 802 to pay, collect or transmit said Local Tax is unrelated to a member's status as an employer or an employee. (Pl Ex. 12, pp. 65-67)

26. Members of Local 802 are subject to disciplinary action for violation of the provisions of the By-Laws of Local 802, including the provisions relating to the 1½% Local 802 tax. (Pl. Ex. 12, Art. IV, § 1 (kk) p. 41)

27. A temporary restraining order was signed in this case on July 20, 1962 by Judge Thomas F. Croake of this court. Subsequently, Joseph Carroli and Charles Peterson sent four letters on the stationery of OLGNY interpreting the meaning of this order. Carroll and Peterson are not parties to this action.

The first letter, dated July 26, 1962, was addressed to all locals of the American Federation of Musicians. The letter stated:

> "ATTENTION ALL LOCALS OF THE AMERICAN FEDERATION OF MUSICIANS
>
> "On Friday, July 20, 1962, U. S. District Judge Thomas F. Croake, issued on order restraining the American Federation of Musicians and all its Locals from collecting the 10% 'surcharge' on traveling engagements and also restraining Local 802 from collecting its 1½% Local Tax. This restraining order covers *steady* engagements as well as single, miscellaneous, or one-nighters. *There Are No Escrow Provisions in this Order.*
>
> "We hereby notify you that you are restrained by Judge Croake's temporary restraining order from

enforcing Article 15 of the American Federation of Musicians Constitution and By-Laws. Violation of that order by you will subject the Federation and its agents (including its Locals and Local Officials) to liability for contempt of court.

* * * * * * * * * *

"In our recent case against the FEDERATION and LOCAL 802, after a 5 day trial, U. S. Judge Levet on June 25, 1962, made the following Finding:

> * * * 'Consequently, Section 186 [of Section 302 of the Taft-Hartley Act, as amended] applies to these payments [for the 10% "traveling surcharge", the 1½% "Local tax" and the Welfare Plan "surcharge"] and since they do not comply with the exceptions contained in Section 186 (C), they are unlawful.' * * *

"Anyone found violating this law is subject to $10,000 fine or imprisonment for not more than one year or both."

The second letter, dated July 30, 1962, was addressed to orchestra leaders. It stated:

"Fellow Orchestra Leader:

"On July 20, 1962 we obtained a United States court order restraining the A. F. M. and all its locals from visiting upon orchestra-leader employers any economic or other reprisals upon the basis of their failure to pay the 10% traveling surcharge imposed by the A. F. M. and its locals and the 'Local Tax' of 1½% imposed by Local 802. It also prevents the union from bringing charges or other union penalties against the leader for failure to pay the 10% tax as well as the Local 802 tax.

"The reason for bringing this to your attention is because several leaders who play the mountains asked us what they should do in event they are told by the union that they must pay this tax. We, therefore pass on to you the advice we have given them:

> "'DO NOT PAY THIS TAX, AND IF THE UNION THREATENS YOU WITH CHARGES OR BRING REPRISALS IN ANY WAY, PUT THIS DOWN IN WRITING AND THIS, TOGETHER WITH ANYTHING IN WRITING FROM THE UNION, MAIL IT IMMEDIATELY TO OUR ATTORNEY, GODFREY P. SCHMIDT AT 60 EAST 42ND STREET, NEW YORK 17, N. Y. HE WILL THEN PROCEED IN FEDERAL COURT TO HOLD THE LOCAL INVOLVED AND THE FEDERATION IN CONTEMPT OF COURT FOR VIOLATING A FEDERAL COURT ORDER AND FOR THREATENING YOUR LIVELIHOOD'.

"We just received a letter from an orchestra leader who plays in the mountains and we are attaching a copy of this letter for your reading. You will note that Marty gives us authorization to act in his behalf. If you wish the same protection as Marty is getting and also wish to stop this ridiculous tax, sign the authorization slip that is attached and send it immediately to our attorney. If you require additional slips for other leaders, please let us know."

The third letter, dated August 9, 1962, was also addressed to orchestra leaders. This letter stated in part:

"Fellow Orchestra Leaders:

"By way of keeping you up to date on the status of the litigation against the Musicians union and particularly against the 10% tax, we are enclosing a reprint from today's Variety which will show you that Stan Kenton, Ralph Marterie and Georgie Auld have joined with Ralph Flanagan and a host of other orchestra leaders in our legal battle against the practice of this 10% tax and other discriminatory

> practices of the American Federation of Musicians and it Locals.
>
> "The mere signing of the authorization slips by these leaders entitle them, under U. S. Court order to immediately cease paying the 10% ~~tax~~ on any of their single and steady engagements. *They have stopped paying and the union can do nothing about it.*"

In the fourth letter, dated August 16, 1962, also addressed to orchestra leaders, Mr. Carroll stated in part:

> "UNDER THIS NEW U. S. COURT ORDER THE UNION CANNOT BRING REPRISALS OR CHARGES AGAINST ANYONE WHO REFUSES TO PAY THESE UNLAWFUL EXACTIONS."

28. There is no evidence whatsoever to connect the plaintiff Cutler in any way with these letters. The evidence proves that the letters were authored by Charles Peterson and signed by Joseph Carroll. (Transcript of hearing, September 19, 1962, pp. 78-89) Carroll did not ask nor receive any advice or aid of counsel in preparing these letters. (Id. at 83, 84-85)

29. Upon the record before me I find that plaintiff has no adequate remedy at law and will suffer irreparable harm if this injunction is not granted. Unless defendants are restrained from imposing, exacting or collecting the local tax and 10% surcharge, plaintiff will suffer irreparable harm by way of the aforesaid exactions, by way of interference with his business, and by way of economic and other reprisals, including loss of business and unavailability of sidemen. Also, irreparable harm will result due to the fact that defendants are mandated by their own constitutions and by-laws to visit penalties and reprisals upon any member (as well as an expelled member) who fails to pay the traveling surcharge and local tax. (Constitution, Federation, Art. 15, §§ 8-12)

30. The plaintiff purports to bring this action for himself and for a class of all orchestra leaders.[4] I find, however, that there is a lack of sufficient credible evidence at this time that such a class exists, and, even if found to exist, that its members are "so numerous as to make it impractical to bring them all before this court."

31. There is no evidence to support the defense of laches.

Discussion

A. Jurisdiction

The single engagement industry, as has previously been determined, consists of interstate commerce. As Judge Friendly wrote in *Carroll v. American Fed. of Musicians*, 2 Cir. 1961, 295 F. 2d 484, concerning the local tax and the traveling surcharge, at page 487:

> "* * * The Local's by-law imposing the 'tax' and the provision of the International's Constitution imposing the 'traveling surcharge' are not limited to

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[4] The complaint in 62 Civil 2552 provides in Paragraph 38:

"38. Plaintiffs bring this action for themselves and for all orchestra leaders who (a) are members of defendants, or are ex-members expelled because of failure or refusal to pay the unlawful 'local tax' or 'traveling surcharge' aforesaid; and (b) are employers or self-employed persons; and (c) are published in 'Allegro' under the heading 'Memberships Terminated for Nonpayment of [illegible]' the said 'taxes' or 'surcharge' or under any similar heading, or are threatened with or are liable to such or other publication if they fail or refuse to pay the said 'local tax' or 'traveling surcharge'. Such members are so numerous as to make it impractical to bring them all before this Court. This complaint raises issues of rights common to all such members; all such members are similarly situated; a common relief for all such persons is sought; the object of this action is the adjudication of claims which do or may seriously affect specific property rights of plaintiffs and of all such persons; plaintiffs fairly represent the members of said class; and this class action authorized by Rule 23 of the Federal Rules of Civil Procedure."

> engagements within the state; indeed, the latter applies only to engagements outside the Local's own jurisdiction, many, if not most, of which would be outside the state of New York. The case with respect to interstate commerce is thus immeasurably stronger than that before Judge Dimock; and if we were preliminarily satisfied of an effect on commerce there, we must surely be so here. We hold that defendants have thus far failed to raise any substantial issue that these two impositions did not relate to 'an industry affecting commerce,' *United States* v. *Shubert*, 1955, 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279."

See also *Carroll* v. *Associated Musicians of Greater New York*, D.C.S.D.N.Y. 1960, 183 F. Supp. 636, aff'd 2 Cir. 1960, 284 F. 2d 91.

Title 29 USC § 402(c) defines "industry affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended." The Labor-Management Relations Act of 1947, 29 USC § 142(1) defines the phrase as "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or the free flow of commerce." The term "commerce" is defined in 29 USC § 152(6) as "trade, traffic, commerce, transportation, or communication among the several States * * *." The amount of interstate business done by employer is not controlling with regard to the power of Congress to regulate such business and Congress has the power to regulate even intrastate business where such business tends to burden or affect interstate commerce. *Labor Board* v. *Fainblatt*, 1939, 306 U.S. 601; *Edison Co.* v. *Labor Board*, 1938, 305 U.S. 197; *Polish Alliance* v. *Labor Board*, 1944, 322 U.S. 643.

The single engagement industry is "an industry affecting commerce" (see Findings of Fact Nos. 7 and 8) and the fact that the rendering of a musical performance is a "local affair" is not determinative. The plaintiff in connection with his business customarily does many more things in addition to the actual leading of his orchestras, such as the negotiating and signing of engagement contracts and the transporting of sidemen, musical instruments and other required materials between states of the United States. (See Finding of Fact No. 12) As Mr. Justice Warren stated in *United States* v. *International Boxing Club*, 1955, 348 U.S. 236, 241, decided the same day as the Shubert case, supra:

> "A boxing match—like the showing of a motion picture (United States v. Crescent Amusement Co., 323 U.S. 173, 183) or the performance of a vaudeville act (Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271) or the performance of a legitimate stage attraction (United States v. Shubert, ante, p. 222)—'is of course a local affair.' But that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce."

Defendants also challenge the jurisdiction of this court on the grounds that the Norris-LaGuardia Act, 29 USC § 101 et seq., prohibits the granting of the injunctive relief sought. The challenge is without merit.

The statute on which this suit is based is 28 USC § 186. Subsection (e) of that section specifically provides that the district courts of the United States shall have jurisdiction "* * * to restrain violations of this section [28 USC 186], without regard to the provisions of * * * sections 101-110 and 113-115 of this title [Norris-LaGuardia Act, 29 USC

§ 101 et seq.]." See *Sinclair Refining Co.* v. *Atkinson*, 1962, 370 U.S. 195, 205.

B. THE CLASS ACTION

Rule 23(a) of the Federal Rules of Civil Procedure in pertinent part provides:

> "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all, may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> * * *
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Rule 23(a)(3) provides for the spurious class action. See generally 3 Moore's Federal Practice, pp. 3442-3455. The rule requires that the character of the right sought to be enforced for or against the class be "several," that there be a "common question of law or fact" affecting the several rights, and that "common relief is sought." *Mutation Mink Breeders Association v. Lou Nierenberg Corp.*, D. C. S. D. N. Y. 1959, 23 F. R. D. 155. As Judge Bryan stated in the Mutation Mink case:

> "The 'spurious class suit' is merely a device for permissive joinder. California Apparel Creators v. Wieder of California, supra [2 Cir., 162 F. 2d 893]; 3 Moore, Federal Practice, 3442. It does not 'grant authority to adjudicate finally rights as to nonappearing parties or to confer any additional substantive rights upon the plaintiffs suing.' California Apparel Creators v. Wieder of California, supra, 162 F. 2d

> at page 897; Oppenheimer v. F. J. Young & Co., 2 Cir., 144 F. 2d 387; Nagler v. Admiral Corp., 2 Cir., 248 F. 2d 319. It is an invitation to the members of the affected class to join in the action. If they do not so join they cannot be bound by the result. 3 Moore, Federal Practice, 3442; Weeks v. Bareco Oil Co., 7 Cir., 125 F. 2d 84; Nagler v. Admiral Corp., supra."

In effect, it is but a congeries of separate suits. See also *P. W. Husserl, Inc.* v. *Newman*, D. C. S. D. N. Y. 1960, 25 F. R. D. 264; *Kaeppler v. James H. Matthews & Company*, D. C. E. D. Pa. 1960, 180 F. Supp. 691, 695.

Plaintiff has failed to prove an essential element required for class actions under Rule 23 of the Federal Rules of Civil Procedure. It appears that plaintiff attempts to define the class as one separate and distinct from the total membership of defendant Local 802. The plaintiff alleges that the class is composed of Local 802 orchestra leaders who, like plaintiff, never act as sidemen and devote all or substantially all of their time to their profession as orchestra leaders, (b) for their engagements employ sidemen who are members of defendant unions, and (c) deal with their clients as employers or independent contractors.

There is a lack of sufficient evidence to support the conclusion that such a class exists.

In 3 Moore's Federal Practice § 23.05 (2d Ed. 1948) it is stated:

> "The *raison d'etre* of the class suit doctrine is necessity, which in turn depends upon the question of number. The question of what constitutes impracticability—when is a class so numerous as to make it impracticable to bring them all before the court—therefore remains.
>
> "A reading of the cases convinces one that whether a number is so large that it would be

> impracticable to join all the parties is dependent not upon any arbitrary limit, but rather upon the circumstances surrounding the case; and there must be a positive showing of such circumstances. [citations omitted]"

Defendants have introduced in this action in support of the non-existence of the class 500 affidavits of members of the unions alleging that no special class of orchestra leaders exists and that the plaintiffs cannot adequately represent their interests. Additionally, these affidavits state that there are many members who do not appear to object and who, consequently, cannot be considered as members of the same class as plaintiff.

It is, of course, true that the entire membership of defendant unions may constitute a class on whose behalf a class action may be instituted to vindicate common rights. But, as the court observed with regard to a true class action in *Giordano v. Radio Corporation of America*, 3 Cir. 1950, 183 F. 2d 558, 560, 561:

> "Here the affidavits upon which the court acted make it perfectly clear that the membership of Local 103 is sharply divided on the very question involved in this case, the expulsion of plaintiff and his associates. * * * With a class thus sharply divided in opinion it would be absurd to say that the leader of one faction in the internecine struggle could adequately represent the whole membership. * * *
>
> "In a true class suit the plaintiffs stand in judgment for the class and a judgment for or against the plaintiffs benefits or binds each member of the class personally under the principles of res judicata. The members of the class must, therefore be capable of definite identification as being either in or out of it. Such identification would not be possible in a case,

> such as this of fluid factional groups in a labor union. * * *
>
> "The suit must, therefore, be regarded as brought by the plaintiff either solely to redress his own personal grievances against the defendants or possibly to redress the grievances of all sixteen individuals whose expulsion has been voted."

The court found that if the latter view was taken this was "a spurious class suit, rather than a true one * * *. [I]t could hardly be held that they [plaintiffs] constitute a class 'so numerous as to make it impracticable to bring them all before the court.' * * * [T]he suit, if it may be entertained at all, must be regarded as brought by the plaintiff for his own benefit solely." Similarly, in *Gray* v. *Reuther*, D. C. E. D. Mich. 1951, 99 F. Supp. 992, aff'd 201 F. 2d 54, plaintiff brought a class action seeking his own reinstatement as an officer of a union local and damages. The court dismissed the complaint and, among other things, stated:

> "Moreover, plaintiff was ousted from office after an election in which approximately two thousand union members voted. Whether or not the election was valid, it shows that a substantial body of the membership of the Local is opposed to the plaintiff's position. The strength of the faction antagonistic to the plaintiff is immaterial; its existence indicates that the identity of interest that would qualify plaintiff to represent the members of Local 12 is lacking. Giordano v. Radio Corporation of America, 3 Cir., 183 F. 2d 558."

Accordingly, the claims here cannot lie as a proper class suit. This disposition, however, does not preclude treating this suit as one brought by plaintiffs (however numerous) in their individual capacities. *Weeks* v. *Bareco Oil Co.*, 7 Cir. 1941, 125 F. 2d 84; see also *Barbot* v. *Frackman*,

D. C. S. D. N. Y. 1961, 191 F. Supp. 171; *Giordano* v. *Radio Corporation of America*, 3 Cir. 1950, 183 F. 2d 558.

C. STANDING TO SUE

Section 186(e) grants the district court jurisdiction to restrain violations of that section as follows:

> "The district courts of the United States * * * shall have jurisdiction for cause shown * * * to restrain violations of this section."

The plaintiff Cutler, being a member of both the Federation and Local 802 (Finding No. 1) has the requisite standing to maintain this action.

D. ILLEGALITY OF TAXES

The illegality of the two taxes in issue turns upon the status of the plaintiff as an employer. For without this status he is not within the provisions of Section 302, Labor-Management Relations Act, as amended, 28 USC § 186. It is there provided in pertinent part:

> "(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> "* * * *
>
> "(c) The provisions of this section shall not be applicable * * * (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment * * * or (5) with respect to money or other thing of value paid to a trust fund established by

> such representative for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That * * * (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon * * *.":

It is conceded that no written authorizations were ever executed by employees with respect to the 1½% local tax and the 10% traveling surcharge. (See Opinion, Findings of Fact and Conclusions of Law, June 25, 1962, filed in *Carroll* v. *Associated Musicians of Greater N. Y.*, 60 Civil 1169, 60 Civil 4025)

Defendants, however, deny that plaintiff is an employer within the meaning of Section 186 and, consequently, assert that the statute is inapplicable to the payments involved herein. Judge Friendly answered the defendants in the following terms:

> "Although defendants deny that the orchestra leader is the 'employer' of the sidemen and claim the father of the bride is the true employer, as indeed the contract form says, we think this contention, far from being serious or difficult, borders on the frivolous for reasons stated in another contention by the Court of Claims in Cutler *v.* United States, 1960, 180 F. Supp. 360, 362,—an opinion followed by Judge Dimock in his decision in Carroll *v.* Associated Musicians of Greater New York, supra, which we affirmed." 295 F. 2d supra at 486.

The contention of plaintiff that he is the employer of his sidemen in the single engagement field is clearly supported by the record before me. (Findings of Fact Nos. 10-15)

Consequently, Section 186 applies to these payments and since they do not comply with the exceptions contained in Section 186(c), they are unlawful.

However, in regards the steady engagement field,[5] there is a lack of sufficient evidence to establish that the plaintiff in this action acts as an employer. (Cutler, 69-71, 176-182, 216-18) Accordingly, the illegality of the tax is here limited to the single engagement field. This finding is without prejudice to the introduction at the trial by the remaining plaintiffs of evidence tending to establish the employer relationship.

E. DEFENSE OF UNCLEAN HANDS

The defendants allege that the plaintiff is not entitled to any equitable relief because he has been guilty of "unclean hands" by having deliberately misrepresented the scope of the temporary restraining order issued by Judge Thomas F. Croake of this court on July 20, 1962 in this action.

The alleged deliberate misrepresentations took the form of four letters signed by Joseph Carroll on the stationary of OLGNY, in which he interpreted the meaning of the temporary restraining order dated July 20, 1962. (See Findings of Fact Nos. 27-28)

Since there is no evidence linking the plaintiff Cutler with these letters, even assuming that these letters constitute inequitable conduct, he is not barred from the relief requested.

---

[5] Under Local 802 rules, an engagement for a period of five or more days in any week or for three or four days per week for two or more consecutive weeks is a steady engagement. Any other engagement is a single engagement.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the parties and of the subject matter of this action.

2. There is insufficient evidence in the record before me to establish a class as defined in the complaint, and even if found to exist, that its members are "so numerous as to make it impractical to bring them all before this court."

3. The plaintiff has standing to maintain this action.

4. The local tax and the traveling surcharge are illegal as applied to the plaintiff in the single engagement field.

5. Plaintiff is not guilty of "unclean hands."

6. Irreparable harm would result to the plaintiff from a denial of a permanent injunction in that the unlawful exactions would seriously and irreparably interfere with the conduct of his business.

7. The plaintiff is not barred by laches.

Therefore, the plaintiff is entitled to an injunction to provide as follows:

(1) That defendants, their officers, agents, servants, employees and attorneys and those persons in active concert with them who receive actual notice of this injunction order be and they hereby are permanently enjoined and restrained from demanding or from attempting to demand from plaintiff when acting as an employer in the single engagement field, as defined in Finding of Fact No. 5 of this opinion:

(A) The one and one-half (1½%) per cent "tax" authorized or defined by defendants in the Constitution (Article 16, Section 26) of defendant, American Federation of Musicians of the United States and Canada, and in the By-Laws (pp. 65 and 66) of defendant, Local 802, Associated Musicians of Greater New York, and in certain Standing Resolutions having the force and effect of By-Laws of Local 802,

(B) The ten (10%) per cent "traveling surcharge defined and promulgated by defendants in Article 15 of the Federation's Constitution.

(2) That defendants, their officers, agents, servants, employees and attorneys and those persons in active concert with them who receive actual notice of the injunction order be and they hereby are permanently enjoined from:

(a) interfering with the said plaintiff or his business,

(b) inflicting upon plaintiff, directly or indirectly, any reprisals or penalties (except purely intra-union penalties, such as explusion) because of failure or refusal upon the part of the plaintiff under the circumstances above mentioned to pay to defendant unions any of the aforesaid "taxes" or "traveling surcharges,"

(c) threatening in any way, whether directly or indirectly, any musicians (sidemen), customers or prospective customers of said plaintiff because of the failure of plaintiff under the circumstances above mentioned to pay to defendant unions any of the aforesaid "taxes" or "traveling surcharges" or because of the termination of membership of said plaintiff where such termination results from failure to pay said "tax" or "traveling surcharge,"

(d) preventing any musicians (sidemen) from working with or for the plaintiff herein because of the failure of plaintiff under the circumstances above mentioned to pay to defendant unions any of the aforesaid "taxes" or "traveling surcharges" or because of the termination of membership of said plaintiff where such termination results from failure to pay said "tax" or "traveling surcharge."

(3) The defendants, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this injunction, shall retract any and all threats, which have not already been retracted, to musicians or sidemen who are members of defendant unions and who work or who manifest a disposition to work for plaintiff, or to actual or prospective customers of plaintiff because of plaintiff's failure to pay the aforesaid "tax" or "traveling surcharge;" and defendants shall advise members of defendant unions that they are not required or expected to avoid or refuse employment with orchestra leaders who have failed to pay the aforesaid "taxes" or "traveling surcharges" or to pay the fines imposed by reason of such failure; and said retraction of threats and said advice to members may be made in the next available issues of "Allegro" and "International Musician" or by individually mailed notices; except that defendants need not address said retractions or advice to the plaintiff herein in view of the specific provisions hereof inuring to the benefit of plaintiff.

(4) That defendants shall forthwith cease publishing, and that defendants shall not publish (such as in "Allegro," "International Musician," etc.) the name of the plaintiff Cutler as having been expelled for either failure to pay the aforesaid "tax" or "traveling surcharge," or any fine imposed in connection with failure to pay said "tax" or "surcharge."

(5) That none of the provisions of this order shall run in favor of any alleged class represented by the above-

named plaintiffs or the named intervening plaintiffs, but shall apply solely and only to the plaintiff Cutler. The preliminary injunction entered on October 16, 1962 shall, however, remain in force and effect as to the other co-plaintiffs.

I expressly direct the entrance of a final decree and judgment as to the plaintiff Cutler upon the express determination that there is no just reason for delay. The stipulation of October 24, 1962 in effect severed the plaintiff Cutler from the other co-plaintiffs and allowed for a separate trial as to him on a stipulated record. Fed. R. Civ. P. 42(b). All of the testimony as to Cutler has already been received and the case as to him is fully submitted. Neither his status as an employer nor his right to a permanent injunction will in any way be affected by the evidence received at the trial as to the status of the remaining plaintiffs. The entrance of an immediate final decree and judgment solely as to this plaintiff will eliminate much unnecessary evidence, confine the issues, shorten the trial as to the remaining plaintiffs, save much expense to the litigants in connection with the trial and contribute considerably to expediting the work of the court. Fed. R. Civ. P. 54(b). *Cf. Shippers Pre-Cooling Serv.* v. *Macks*, 5 Cir. 181 F. 2d 510, 514, cert. denied 340 U. S. 816 (1950); *Combined Bronx Amusements* v. *Warner Bros. Pictures*, D. C. S. D. N. Y. 1955, 132 F. Supp. 921.

The foregoing constitutes my Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Settle decree on notice.

Richard H. Levet
United States District Judge

Dated: New York, N. Y.
November 2, 1962.

APPENDIX C

United States Constitution, Art. 1, § 8, cl. 3:

The Congress shall have Power . . .

* * * * * * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Labor-Management Relations Act of 1947, as amended, 61 Stat. 136, *et seq.*, 29 U.S.C. 141, *et seq.*:

Sec. 2(3):

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Sec. 302:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, which ever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical care or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proivso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contribution to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 473

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802,

Petitioners,

v.

BEN CUTLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

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October 14, 1963

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BRIEF FOR RESPONDENT IN OPPOSITION*

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit (dated April 30, 1963) is reported at 316 F. 2d 546 and is reprinted in Appendix A of the Petition, pp. 1a-7a. The opinion (entered November 13, 1962) of the District Court for the Southern District of New York is reported at 211 F. Supp. 433 and is reprinted in Appendix B, pp. 7a-35a of the Petition. A related (see footnote No. 1, p. 4, Petition) opinion of the United States Court of Appeals (dated October 17, 1961) is reported at 295 F. 2d 484 and is reprinted in Appendix A, pp. 25-33 of this Brief.

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* Throughout this Brief references to the Petition are indicated thus: P. p 9 or P. p 11a ¶6; references to Appendix to Appellants' Brief (blue cover) in the Second Circuit (Docket No. 27946) are indicated thus: 151b; and references to the "Stenographers Minutes" of the Trial in the District Court in 60 Civil 1169 and 60 Civil 4025, March 5-9, 1962, are indicated thus: S. M. 71. The latter references are based on P. p 9a (last ¶).

Statute and Union Regulations Involved.

This case involves §§2(3) and 302 of the Labor-Management Relations Act of 1947, as amended, (61 Stat. 136 *et seq.*, 29 U. S. C. 141 *et seq.*) reprinted in Appendix C, P. p 36a-41a. It also involves (a) Article 15 of the By-laws of Petitioner, American Federation of Musicians of the United States and Canada (hereinafter referred to as AFM), reprinted in Appendix B of this Brief; and (b) a "Standing Resolution" or By-law of Petitioner, Associated Musicians of Greater New York, Local 802, AFM, (hereinafter referred to as Local 802), reprinted in Appendix C of this Brief. Petitioners misrepresent these exactions (P. p 5-7 and *passim*); for that reason they were reprinted in full in Appendices B and C of this Brief. The "Form B" contract, prescribed by Petitioners and often mentioned in the Petition, is reprinted in Appendix D of this Brief.

Questions Presented.

1. Did the Court of Appeals with respect to Cutler violate Rule 52(c) of the Federal Rules of Civil Procedure or otherwise warrant the exercise of this Court's supervisory powers as Petitioners claim in unspecific language?

2. Did the Court of Appeals reject or disregard valid, uncontested and significant findings of the District Court concerning Cutler?

3. Did the Court of Appeals in ruling on Cutler's rights construe §302 of the Act in a manner (a) contrary to the intent of Congress; (b) destructive of the legitimate interest of Petitioners; or (c) inconsistent with Petitioners' freedom of association under the First Amendment?

4. Did Cutler's contracts of engagements with his clients give to those clients "right of control" over Cutler and his orchestra?

5. Were Cutler's employees "employed in an industry affecting commerce" within the meaning of §302 of the Act? (The complaint does *not* allege "that the performance of a single musical engagement is an 'industry affecting commerce,'" as Petition avers, p. 6)

Counterstatement of Case.

By stipulation of the parties (187b-188b), the decision below involves only the case of one orchestra-leader-employer: Respondent Ben Cutler (34a-35a).

A. *The complaint.* Cutler's complaint attacks two Union regulations as illegal (under §302, Labor-Management Relations Act of 1947, as amended, hereinafter called "the Act"); *viz.:*

1. Article 15 (Plaintiff's Exhibit 11, S. M. 113; Complaint ¶22 and Exhibit A, 7b, and Answer ¶14, 16b), reprinted in Appendix B of this Brief. It requires orchestra leaders like Cutler to add a 10% "traveling surcharge" to the "price of all MISCELLANEOUS and MISCELLANEOUS OUT-OF-TOWN ENGAGEMENTS" (as therein defined) and to pay this 10% *price addendum* to the AFM Local in whose jurisdiction the engagement was played; and

2. A "Standing Resolution" (Complaint ¶23, 7b and Answer ¶15, 16b), reprinted in Appendix C of this Brief. This imposes on all members, including orchestra-leaders-employers, a 1½% "Local Tax," for whose "collection and payment" the *orchestra leader* is made responsible. This tax is computed on the basis of the "scale price" for the services of orchestra members (including the orchestra-leader-employer) for each engagement.

B. *Cutler as Employer.* Cutler works predominantly in the single-engagement field (154b); on a few occasions he has played steady engagements (S. M. 70-71; 182). "Purchasers" of music (the orchestra leader's "clients") rarely contact Cutler in the first instance. He constantly and normally solicits his own engagements by personal contacts, by advertisements and by telephone (196b-197b). His engagements are not "highly casual" (P. p 4). His orchestras play an average of about 6 engagements on each Saturday and about 500 engagements per year. His gross annual income averages about $190,000.00 per year. (Plaintiff's Exhibits 20, 20-A and 20-B; S. M. 158-161). More than 50 per cent of Cutler's gross income is derived from performances in States other than the State of New York. (Plaintiff's Exhibits 20, 20-A and 20-B, S. M. 158-161; Cutler's contracts for engagements 1959-1961) Cutler never serves as a sideman (employee musician), giving his full time to his profession as orchestra-leader-employer (S. M. 116; 79b; 196b; P. p 13a-15a). When he plays an instrument, he does so usually as a soloist, standing in front of his orchestra and leading it.

Since 1960, Cutler has not used the "Form B" contract required by Petitioners for the booking of engagements (S. M. 132-135; Plaintiff's Exhibits 13 and 14, S. M. pp. 135-137; Plaintiff's Exhibits 20, 20a and 20b, S. M. 159-164).

C. *Petitioners' exactions not "dues."* Prior to this litigation, Petitioners did not maintain a record of the names of its members in Cutler's (or any other leader's) orchestras, nor of payments of the "Local Tax" or 10% "Surcharge" to credit against such members' names as (alleged) "dues". Until this litigation, Petitioners never regarded such "Tax" and "Surcharge" as *dues*. (S. M. 502-503; 704-7[illegible]3). In computing withholding taxes, neither Cutler nor other leaders ever regarded the ten percent traveling surcharge as *wages* of sidemen. (S. M. pp. 247-248). His sidemen never asked him for any portion of the traveling surcharge (S. M. p. 248). No intra-union charges were ever processed to penalties against Cutler (a Union member for 30 years) despite the fact that he never paid any part of this *price addendum* to his sidemen. (S. M. 169; 173-175; 214-217).

Since institution of this and related litigation, Petitioners have vacillated about the nomenclature and nature of the two "taxes" in question. In their Petition, they refer to them as "work taxes" (P. p 3, 4, 6, and 12), as "taxes" (p. 6) and as "work dues" (p. 18). Petitioners' answer and witnesses in 60 Civil 4025 uniformly referred to these "taxes" as "dues" (Answer ¶¶11 and 12). The only "dues" described in defendants' By-laws are those paid on a regular basis by all members: "The membership dues shall be $24.00 per annum, payable $6.00 quarterly in advance on January 1, April 1, July 1 and October 1 * * *." (By-laws, Local 802, p. 31, Section 6). Petitioners' officers were unable to cite any section of their organic law which denominated the "local tax" or the "traveling surcharge" as *dues*. (S. M. 502-503; 704-713). They were unable to cite any Union publication, prior to the litigation, which ever called these exactions "*dues*". Petitioners' financial reports, prior to the litigation, always distinguished between "dues" and "taxes", itemizing them separately. (S. M. 579; 703).

D. *The 10% surcharge imposed only on leaders.* The petition (P. p 5-6) falsely asserts that AFM By-laws require *every member* to pay a "work tax" of 10% of the "minimum scale." The record shows no such "tax" obligation on any Union members *except orchestra leaders* and there is no reference to "work tax" in Petitioners' organic law.

E. *The 10% surcharge not wages.* The Petition also falsely alleges: "The AFM By-laws provide that traveling musicians be paid (by the purchaser of the music) at least 10% more that the minimum wages,"—as if the "surcharge" consituted a *wage* increase. No such provision is to be found in Petitioners' By-laws. (Appendix B) The record contradicts the quoted allegation. (S. M. 92-115; 168; 226-228; 263-274). The "purchaser of music" is not a member of Petitioners; and Petitioners lack power to require *non-members*, like such purchasers, to pay wage increases to orchestra musicians. Moreover, Cutler's testimony on this point remains uncontradicted on the record: "But in the single engagement field * * * this 10% is not part of his [the sideman's] wages in my opinion and in the opinion of all the other leaders in New York City, and that is why none of them turn this money over to the sideman." (S. M. 215-216).

F. *Petitioners do not bargain with leader-employers.* Cutler is clearly an employer (195b-198b). Petitioners never contradicted the Trial Court's Findings in this respect. No evidence contraverts Cutler as to his own employer status. The U. S. Court of Claims in *Cutler* v. *United States*, 180 F. Supp. 360, found, on a careful review of the facts, that Cutler was an employer. Petitioners admit that, "as a matter of policy," they never bargained collectively with Cutler (or any orchestra leader) in the single-engagement field (which includes about 90% of musical services in this country). See P. p 11a ¶6 and p 6a, footnote 7.

G. *Leader pays both union exactions out of own funds.* The Court of Appeals is accurate in finding that "the leader is not really collecting the tax and the surcharge from the sidemen at all." P. p 6a. In paying *traveling surcharges*, Cutler paid "out of his own share." The *price* addendum constituted by the *"traveling surcharge"* was never *deducted* from the wages of his sidemen by Cutler:

It was *added* to the minimum (Union) *price* of the engagement paid by his client. Likewise, Cutler paid Local 802 *taxes* (Appendix C) "out of his own share" in two ways: (i) He paid a 1½% "local tax" *on his own minimum profit* ("leader's money" as unilaterally fixed by Local 802) from the engagement. This minimum profit *for the leader* according to the record (S. M. 107-108; 176) and according to Local 802's unilateral regulations ("Price Lists") is admittedly two-times the minimum wage fixed by Local 802 *for the sideman.* (ii) Cutler paid the "local tax" on the basis of 1½% of the *minimum wages* he paid to his sidemen. (*Those minimum wages are unilaterally* (i.e. without collective bargaining of any kind) ***imposed by Local 802 under*** *Union regulations* which, as a coerced member, he must obey; since *Petitioners, as a matter of avowed policy, do not baragin with orchestra-leader-employers or other members.* P. p 11a ¶6). The fund of money out of which Cutler paid *wages* to his sidemen is the same as the fund of money out of which he paid his own and his sidemen's "local tax." Its source is the moneys (the total *price*) paid to Cutler by his clients. That fund belonged to Cutler until he alienated it by drawing his checks for the "*local taxes*" payable to the Union and his checks for the *wages* payable to his sidemen. Most of the time Cutler deducted the amount of the "*local taxes*", which he paid *on behalf of his employees,* from the wages he paid to sidemen. Neither Cutler nor Petitioners ever obtained from sidemen any wage-deduction authorizations (199b and 200b) to authorize those deductions. Since the litigation, Cutler has refused to make these deductions.

Thus, "It is clear [as the Court of Appeals found] that the *10 percent surcharge* is an exaction *from the leader's* [*Cutler's*] *share.* The amount is never *deducted from the sideman's wages.*" (P. p 6a, emphasis added) It was *added* to the minimum "price of the engagement" as prescribed by the AFM Local involved. Upon its collection from the client, this price addendum (as part of the total price) immediately became part of Cutler's own funds. (Appendix B)

The record wholly supports the Court of Appeals' statement in respect of the "traveling surcharge": "The leader [Cutler] is here required to pay further exactions entirely different from that of other union members." (P. p 7a) Sidemen were never required to pay the 10% *price addendum* established by Article 15 (Appendix B), which specifically says that the 10% price addendum must be collected "from orchestra leaders playing engagements." No provision in Petitioners' By-laws authorizes either collection thereof from *sidemen* or penalizing *sidemen* who fail to pay the "traveling surcharge." Petitioners' By-laws only provide penalties for *orchestra leaders* who fail to pay the "surcharge." The AFM never, before this litigation, kept any record of the sideman's alleged "union obligation" in this respect. (S. M. 847) No AFM records ever credited *sidemen* with payments of such "obligations." Cutler's sidemen never included any part of the "surcharge" as *income* under income tax laws. (S. M. 247-248)

II. *No basic conflict between decisions below.* The District Court's Findings are not in any significant respect contradicted by the Court of Appeals decision. The District Court did *not* find "that the Local 802 tax *and the traveling surcharge* are imposed on the sideman's earnings, *that the amounts are in fact deducted from the sideman's wages,* and * * * that the leader is collecting and paying the *sideman's union obligations.*" (P. p 10, emphasis added) On the stand, Petitioners' officers were unable to refer to any section of Union By-laws which imposed this alleged "union obligation" *upon sidemen.* (S. M. 502, 520, 593, 618-619, 717, 718) The "traveling surcharge" is never imposed upon the *sideman's earnings.* Rather it is "added to the *price* of all Traveling and Miscellaneous out-of-town Engagements." (Appendix B, Section 3, emphasis added). The wage checks payable to sidemen were computed by Cutler without reference to the 10% "traveling surcharge". Nothing was ever *deducted* from sidemen's wages under any Union "traveling surcharge" regulations. (Article 15, AFM By-laws, Appendix B). Petitioners' witness, Arons, denied such deduction: Q. Isn't it true, Mr. Arons, that the 10% traveling surcharge is an addendum to the price charged by the orchestra leaders to his client? A. That is true. (S. M. 508)

I. *Trial Court's minor misconceptions corrected by Second Circuit.* The Trial Court did make (in one relatively insignificant respect) an enigmatic and self-contradictory Finding: that "Federation members who perform a 'miscellaneous, out-of-town engagement' *are paid, but do not actually receive, in addition to their wages,* an amount equal to 10% of the minimum wage established by the local" (198b, ¶17, emphasis added). The Trial Court was there misled by Petitioners' briefs into contradiction of record evidence. In any event, this Finding is a long way from holding what Petitioners say it holds: that the surcharge "money came from the earnings of all the performers." (P. p 14; see also 198b, ¶18) How can someone be *paid but not receive* a wage increase? The District Court was obviously in error (an error which the Court of Appeals properly avoided) in reading Article 15 as requiring *payment to traveling sidemen of a wage "addition"* in an amount equal to 10% of sidemen's minimum wages. (P. p 12, footnote 7, ¶17, and Appendix B) Article 15 of the AFM By-laws contains *no provision requiring payment* of the 10% traveling surcharge to sidemen. In fact, Cutler never did pay any part of the surcharge to his sidemen. Article 15 simply fixes the surcharge at 10% of the "*price* of * * * ENGAGEMENTS," (Section 3, Appendix B and Section 16). Furthermore the "surcharge" is not calculated merely on the *sideman's minimum wage,* as the Trial Court implies. It was also calculated on the *orchestra-leader-employer's minimum profit* or "leader's money". (S. M. 107-108; 114-115; 167-172).

The Trial Court somewhat improperly found "that the [1½%] local tax is to be payable and collected from all members * * * on all engagements based on the scale price therefor * * * and the orchestra leader * * * is responsible for *collecting and transmitting* the 'local tax'" (200b). The "Standing Resolution" says *twice* (p 40, *infra*) that the *orchestra leader* is responsible for the "collection *and payment*" of the "local tax" of 1½ per cent, (Appendix C). Under Petitioners' By-laws, the orchestra leader is responsible for the wages of his sidemen even when the client does not pay for the engagement. In such cases, the entire "local tax" comes out of the orchestra leader's pocket.

ARGUMENT.

(Reasons for Rejecting the Writ)

I. THE ISSUES ARE NOT NOVEL. Was Cutler an employer? Was he and were his employees in an industry affecting commerce? Were the union exactions listed within the exceptions included in §302(c) of the Act? These are commonplace and well settled issues of a type often raised under the Taft-Hartley Act. (No issue here concerns the "Form B" contract, despite contrary language in the Petition, since Cutler had not used that form since 1960.) (S. M. 134-137; 172) Certiorari was not intended to provide litigants with just one more opportunity for argument.

II. No Conflict Between Courts. The decision of the Court of Appeals for the Second Circuit is not in direct or even indirect conflict with the decision of any other Court of Appeals on the same matter. There is no conflict with applicable State law. No such conflicts are alleged by Petitioners. No important question of federal law is involved which has not been, but which should be, settled by this Court. No conflict with applicable decisions of this Court exists or has been alleged by Petitioners. They have not even cited an alleged conflict based upon differences between general principles or reasonings developed in two different decisions. Nor have they alleged so much as inconsistency in *dicta* found in different decisions. Were there such conflict, the issue here is not of such importance as to warrant a writ. No showing of the need to define a national, uniform rule was or can be made, since only the AFM and its Locals are out of step with the statute and with all other unions in the country; and the rule below is clearly consonant with the national rule defined by Congress. Petitioners' theory of criticism of the decision below would introduce a new rule in direct conflict with decisions of this Court and with decisions of Courts of Appeals in other Circuits. *Sheet Metal Contractors Assn.* v. *Sheet Metal Workers International Assn.* (CA 9) 248 F. 2d 307; *U. S.* v. *Pecora* (CA 3) 267 F. 2d 512; *U. S.* v. *Ryan*, 350 U. S. 299; *U. S.* v. *Gibas* (CA 7) 300 F. 2d 836; *Arroyo* v. *United States*, 359 U. S. 419.

III. The Issues Are Not of National Importance. Only one orchestra-leader-employer is involved, despite Petitioners' frequent lapses into langauge suggesting that the appeal below concerned class-action issues. (P. p 4-5) Whether Cutler is an employer and whether his employees are in an industry affecting commerce are scarcely questions of national importance. Whether Petitioners' exactions are "dues", or not, is not particularly significant since, even if they are, it is admitted by Petitioners that no dues deduction authorizations were signed by Cutler's sidemen. Even if "the vast majority of leaders are not employers" (P. p 14), the record shows without contradiction that Cutler is an employer. (P. p 13a-15a) Were Cutler the only employer in the Union, Petitioners' reasoning would still not be valid.

IV. NO CLASS ACTION IS INVOLVED. Neither technically nor substantially is a class action here involved. The class action asserted in the complaint was dismissed by the District Court (P. p 32a ¶2); and no appeal was taken by plaintiffs below from that dismissal. Therefore, the ruling here challenged by Petitioners is in no sense a class ruling. Upon it depend no plans, hopes and aspirations of many people, because, by stipulation of the parties only one orchestra leader's case is involved. No question of scope or import under the Constitution, laws or treaties is raised. The impact of the rule under review is narrowly confined. It is not apt to have continuing future consequence, because the offending By-laws have been repealed effective January 1, 1964. (P. p 5, footnote) The issue here is of interest or importance only to the immediate parties. It does not qualify for *certiorari*. The decisions of the Courts below turn solely upon an analysis of the peculiar facts involved and upon a particular contract (Form B), which is not used by other unions nor by Cutler. *Bartels* v. *Birmingham*, 332 U. S. 126.

V. THE DECISIONS BELOW INVOLVE NO IMPACT ON THE OPERATIONS OF OTHER LABOR UNIONS. No labor unions except AFM Locals use the Form B contract. No other labor unions: (a) systematically refuse to deal with employers or to sign labor contracts with them [P. p 11a ¶6]; (b) insist on regarding *employers* as *employees* by virtue of a bare, colorable contract [P. p 5]; (c) try to make the bizarre distinction between *employer*-members *acting as employers* and *employer*-members *acting as unionists* [P. p 18]; (d) systematically violate §302 of the Act [P. p 5, footnote]; (e) refuse to obtain wage deduction authorizations where they claim "dues" on check-off [P. p 17 ¶24 and p 16a ¶20]; and (f) continued so deliberately, so long and so repeatedly to disregard five court decisions reemphasizing the mandate of a federal statute with civil and criminal sanctions [P. p 5, footnote].

VI. THE QUESTION WILL SOON BECOME MOOT. Petitioners admittedly (P. p 5, footnote) have amended their Bylaws effective not immediately but on January 1, 1964, in an effort to eliminate the "work taxes",—*i. e.*, the very exactions which Cutler attacks and which the Courts below condemned. Meanwhile (and until January 1, 1964) they continue to violate the statute without changing what they call their "method of collection".

VII. PETITIONERS CLAIM (P. p 6) THAT THE COMPLAINT ATTACKED ONLY THEIR "METHOD OF COLLECTION". As a consequence, they contend repeatedly that the decisions below, granting relief as requested in the Complaint, affected only their "method of collection". They can easily and lawfully change that method without bothering the Supreme Court of the United States. Indeed, effective January 1, 1964, they claim to have done so already, by amending their own Bylaws. (P. p 5, footnote).

VIII. Obedience to the Statute Presents No Particular Difficulty to Other Unions. Why Should It Be Difficult for Petitioners? Even on Respondent's contention that the exactions are not "membership dues", there is nothing to prevent Petitioners (in their quest for union income) from enacting (as other unions do) a *lawful dues system* and then obtaining from sidemen-employees proper dues-deduction authorizations, with which they could approach orchestra leaders like Cutler for the purpose of collectively bargaining check-off and other agreements. On Petitioners' contention that the exactions are "dues", Petitioners should negotiate check-off agreements, as other unions do. All other unions have long since adjusted to the Act and Petitioners can easily, if belatedly, imitate them. Petitioners can avoid violation of the Act (and of criminal responsibility under it) by refraining, as all other unions do, from collecting from *employers* like Cutler any exaction not within the exceptions listed in §302(c) of the Act.

IX. Petitioners Ask This Court to Adjust an Alleged Conflict Between the Courts Below Respecting Relatively Important Findings of Fact. In effect, Petitioners assert a conflict between a decision of the Court of Appeals and a decision of the United States District Court for the Southern District of New York as basis for certiorari. Such a conflict does not, in fact, exist in respect of any matter of basic fact or law. Even if it did exist, it would not support the Petition. All findings of substantial fact made by the District Court received the concurrence of the Court of Appeals. The Supreme Court of the United States is not a court for correction of errors in fact-finding. *United States v. Johnston*, 268 U. S. 220, 227. It does not undertake to review concurrent findings of significant fact by two courts below in the absence of very obvious and exceptional showing of error. *Graver Manufacturing Co. v. Linde*, 336 U. S.

271, 275. No such showing was or can be made. Ample evidence supports the accurate reading of the record made by the Court of Appeals. Most of that evidence is uncontroverted. The evidence would have supported a jury verdict for the plaintiff.

X. THE STATUTORY INTERPRETATION ON WHICH THE DECISIONS BELOW WERE PREDICATED WAS NOT DESTRUCTIVE OF LEGITIMATE INTERESTS OF LABOR ORGANIZATIONS. Only AFM Unions are involved in the Cutler case. No other union presumes to "tax" *employers* without deigning to bargain with them. No other union is even remotely affected by this case. No other union coerces employers into union membership and then refuses to bargain with them precisely because of their union membership. No other union compels *employers* to become members and then taxes them *as union members* in a manner which Petitioners admit would be unlawful if the tax were levied on *employers qua employers* (P. p 14). Petitioners say the decision below is "grossly destructive of the legitimate interests of labor organizations"; as if other unions do what Petitioners did here. Petitioners do not list the "legitimate interests" which are being destroyed. Section 302 has been in operation since 1947; and unions in general have not significantly suffered in their legitimate interests.

XI. THE INTEREST OF UNIONS TO ENLIST EMPLOYERS LIKE CUTLER AS DISTINGUISHED FROM SELF-EMPLOYED PEDDLERS. Petitioners rely on an alleged "commonplace" to the effect that "working employers are in economic competition with ordinary workers" (P. p 18-19). Thus they seek comfort from this Court's statement in *Los Angeles Meat Drivers Union* v. *United States*, 371 U. S. 94, 103, that unions "often have a legitimate interest in soliciting self-employed entrepreneurs as members" (P. p 19). The short answer is that Cutler is *not* a "self-employed entrepreneur" in the sense of the decisions cited in the Petition (P. p 19). Cutler employs many employees regularly. The self-employed persons in those cases employed no one. The work Cutler does in conducting his orchestra (even when he plays an instrument as soloist while conducting) is vastly different from the sidemen's work. Leading an orchestra is not the same as playing an instrument therein, even when the leader (like Cutler) plays an instrument. He does not remain just an instrumentalist when he plays as soloist while leading his orchestra, standing before his men. In *Los Angeles Meat Drivers Union,* the *employee* "grease peddlers" did exactly what the *self-employed* "grease peddlers" did. The same is true of the other cases cited in the Petition (p. 19). None of the "self-employed entrepreneurs" in those cases regularly employed dozens of employees each week, as Cutler does. "The average is six or seven men on each engagement." (S. M. 74) Sometimes 30 men play one engagement. It reaches far into the absurd to put an orchestra leader of Cutler's reputation and vogue in the same employer-status as self-employed peddlers. Besides, in all of the cited cases, the unions involved engaged in collective bargaining and signed labor contracts covering "self-employed entrepreneurs". Petitioners never do that. In any event, this Court recognized in *Los Angeles Meat Drivers* that unions *may not,* in certain cases, admit (or coerce as in Cutler's case) self-employed persons into membership. Where, as here, employers join with unions in fixing prices, the combination is forbidden without infringement of Constitutional freedom of association. The only competition permitted by Petitioners to an orchestra-leader-employer like Cutler is competition for engagements at prices *at or above the minimum prices of engagements* prescribed by Petitioners'

"Price Lists". Petitioners, in cooperation with orchestra-leader-employers who are subservient to them, forbid all competition for engagements between orchestra leaders at *prices below* the minimums set in their Price Lists. Thus, Petitioners have no legitimate interest in having members like Cutler, whose very union membership constitutes a combination in violation of antitrust laws. *Allen-Bradley Co.* v. *Local 3, I. B. E. W.*, 325 U. S. 797.

XII. THE DECISION BELOW IS CLEARLY CORRECT. The ruling of the Court of Appeals is *correct* legally, and it is *just* as a matter of equity. Petitioners misread the decision for which they seek review by saying that the "essence of the holding of the Second Circuit is that a *special* tax levied *only* against employer-members is prohibited by Section 302" (P. p 14). The Second Circuit simply held "that the Unions' demand for the 1½ percent wage tax and the 10 percent surcharge payment violates §302" (P. p 7a). The Second Circuit's decision was *not* contrary to the record nor contrary to express and uncontested basic findings of the District Court. Petitioners predicate their contentions to the contrary on the District Court's Findings numbered 17, 18, 19, 23 and 25, quoted in full as a footnote, P. p 12-13. The District Court concluded to the illegality of Petitioners' exactions from Cutler after it had made the very findings (among many others) to which Petitioners call attention in their footnote. The Court of Appeals found the same illegality; and, with respect to Petitioners' quixotic "construction of §302, reached the same result" (P. p 8). At this point Petitioners' argument becomes somewhat involved and very "iffy". Petitioners contend (i) that the Court of Appeals erroneously assumed five findings of fact, which are set forth in paragraphs (a) through (e) *infra;* (ii) that these five *assumptions* of the Court of Appeals are directly contradicted by the Findings of the District Court; and

(iii) that, *if* the Court of Appeals had not made these *assumptions* and *if* the Court of Appeals had concurred with the District Court's Findings, then the Second Circuit's decision would never have concluded that Petitioners had violated Section 302.

The fact is that the five so-called "assumptions" of the Court of Appeals are all *facts* which are well established in the record; and that the District Court at no time directly contradicted these facts:

(a) That the "taxes on the sidemen's work" were *not* due "from the sidemen themselves" and were *not* "payable out of their own earnings" (P. p 12-13 and 6a). [This proposition is established in the record by Petitioners' By-Laws (Appendices B and C), and by Petitioners' theory and practice (Counterstatement, pp 6-8, *supra*) before the exigencies of this litigation prompted Petitioners to invent a new theory.]

(b) That Cutler, the employer-member, was "not merely performing a *ministerial task* for the union" in transmitting to Petitioners the "taxes" involved. (P. p 13 and 6a) [In denying this proposition, Petitioners do what they falsely accuse the Court of Appeals of doing: "premising * * * critical factual assumptions", (P. p 11) directly contrary to the record evidence. The Trial Court nowhere found that Cutler's payment of the unlawful exactions was a "ministerial task". These words first came into this litigation by way of the Second Circuit's decision of April 30, 1963. (P. p 6a). Petitioners also neglect that portion of the exaction demanded by them from Cutler, which was *his personal "tax"*, computed respectively on 10% and 1½% of his "leaders' money". This, indisputably, "came out of his share" and was disbursed out of his pocket.]

(c) That "*the leader is not really collecting the tax and surcharge from the sidemen at all; he is* *actually paying the Union out of his own share.''* (P. p 9) [This proposition is established as a fact in the record by the Counterstatement, *supra,* Section G., pp 6-8]

(d) That *"The 10 percent surcharge is an exaction from the leader's share. The amount is never deducted from the sidemen's wages."* (P. p 9) [This factual proposition, too, is established in the Counterstatement, *supra,* Section G., pp 6-8]

(e) That *"The leader is here required to pay further exactions on a basis entirely different from that of other union members."* (P. p 9-10) [Only the leader pays the "surcharge" or 10% addition to the price of the engagement. No sideman could make or demand such a charge from the leader's client. As to the "local tax", admittedly the Local 802 rule is that the leader pays twice as much as the sideman.]

Neither the record nor the Trial Court's Findings support Petitioners' "iffy" speculations respecting these five valid propositions derived from the record by the Court of Appeals. Not one of the above five propositions is directly contradicted by any finding made by the Trial Court; despite petitioners' specious pretense that certain District Court findings (reproduced in P. p 12-13; footnote) were repugnant to what the Court of Appeals saw in the record. But assuming, *arguendo,* the factual accuracy of Petitioners' contradictory views on propositions, (a) through (e), *supra,* Cutler's case is unaffected; and the Second Circuit's ruling is not invalidated; because Petitioners conveniently neglect the fact (also found by both Courts below) that these exactions were paid by Cutler and demanded by Petitioners without wage deduction authorizations signed by Cutler's employees, as required by §302(c) of the Act.

XIII. THE DECISION BELOW DID NOT MISCONSTRUE §302 OF THE ACT. Petitioners argue that the Courts below misconstrued §302 of the Act by failing to recognize that "fulfillment by union members [even when they are, like Cutler, *employers*] of obligations imposed on them solely as members", renders the employer's and unions' acts of respectively paying and receiving the exactions *lawful.* Petitioners do not want §302 construed "so as to prevent employers, * * * lawfully members of the union, from meeting obligations equally required of non-employer members" (P. p 14). Under this argument, union By-laws can repeal a Congressional enactment, and *union* "obligations" displace *statutory* obligations. Refutation is implicit in the very statement. The Court below correctly rejected the argument "that the leader's [Cutler's] membership in the Union immunizes him from the limitations which Section 302 imposes on him because of his being an employer" (P. p 6a). *United States* v. *Ryan*, 350 U. S. 299; *Arroyo* v. *United States*, 359 U. S. 419.

XIV. CONGRESS' LEGISLATIVE INTENT WAS NOT VIOLATED BY THE INTERPRETATION OF §302 MADE BELOW. Petitioners argue that the Courts below interpreted the section "in a manner * * * contrary to the intent of Congress". The "*Legislative History of the Labor-Management Relations Act, 1947,*" (P. p 22) recalls that what inspired Congress to pass the Section was (a) the "tax" imposed by the United Mine Workers for the purpose of instituting, *as a result of a collective bargaining*, the U. M. W. Welfare Fund (pp 1310-1311; 1305-1306); and (b) the AFM tax (designed by James Caesar Petrillo, then AFM President) on records (p 1312), *also resulting from collective bargaining.* Petitioners cite *Arroyo* v. *United States*, 359 U. S. 419, 424-425, wherein this Court states that §302 was designed "to deal with problems peculiar to collective bargaining." It was aimed "at practices which Congress considered inimical to the integrity of the collective bargaining process." Petitioners conclude: "The collection and transmittal of union work taxes by a *union member* [who is also an *employer*] can hardly be considered inimical to the integrity of the collective bargaining process * * *". The short answer is that collection of exactions by a union which (like Petitioners) systematically and admittedly rejects the collective bargaining process (P. p 11a ¶6) is clearly inimical to that process. Congress *did* regard collection and payment (by *employers* to *unions*) of "work taxes", not included in the exceptions listed in §302(c), as inimical to the integrity of collective bargaining. In any event, Petitioners, who "as a matter of policy" refuse to bargain with orchestra-leader-employers like Cutler, are out of character in thus posing as protagonists of collective bargaining. Senators like Senator Claude Pepper opposed passage of §302, on the argument that *the section interferred with collective bargaining.* That is an argument which can only be made where there *is* collective bargaining. It could not logically be made here respecting the AFM and its Locals, which impose "taxes" unilaterally and *without collective bargaining* (P. p 11a, ¶6).

XV.. Cutler is an Employer Under the Test of "Right of Control" and the Test of "Economic Reality".

Whether the test of employer status be "economic reality" or "right of control" (P. p 22-23), Cutler is a genuine *employer.* (*Cutler* v. *United States,* 186 F. Supp. 360, and P. p 13a-15a.) Confused about the sometimes nebulous criteria which distinguish "employees" from "independent contractors" in some cases under the law of Agency and under the Act, Petitioners seem to find difficulty in distinguishing an obvious employer like Cutler from a sideman and from self-employed grease peddlers. The "*Legislative History of the Labor-Management Relations Act*, 1947", does not (as Petitioners allege, P. p 22-23) show that Congress repudiated, for the purposes of the Act, the "economic reality" test. (*E.g.*, a plant owner may not give the "right of control" over his employees to his wife by a bare contract and then assert to the NLRB that he is *not* the employer under the Act, even though he *is* the employer by the test of "economic reality".) Cutler is an employer by both tests on undisputed evidence. The Court of Appeals described Petitioners' "Form B" contract (Appendix D) correctly and accurately as "a self-serving subterfuge which is not entitled to any weight" (P. p 5a). But, even if, *arguendo*, this descriptive dictum be erroneous, that leaves Cutler's case unscathed, since *he does not use the Form B Contract.* Appendix D shows that even if he did, there would be no derogation from his status as employer.

XVI. Rule 52(a) F. R. C. P. was not Violated. "Finding of Fact" #17 was clearly and on its face erroneous. A Court of Appeals is not required by the Rule to adhere to an erroneous finding of fact. Moreover, "Finding of Fact" #17 is really a *conclusion of law.* It is therefore not protected by Rule 52(a). *Hummel Brothers Co. v. Serrick Corp.,* (CCA 7, 1941) 122 F. 2d 740. This "Finding" or conclusion is not basic. The structure of the Court of Appeals' reasoning survives total demolition or partial elimination of that Finding or conclusion. Petitioners' suggestion that the Court below, by disregarding Finding #17, transmuted the whole "theory of statutory violation underlying the injunction" (P. p 14-15) and raised "a serious question of constitutional due process" is too patently false to need comment. It simply does not matter "that the transmittal is performed solely as a union obligation" (P. p 14). A higher statutory obligation overrides the "union obligation".

XVII. If Petitioners Really Believe that the Involved Exactions are "Membership Dues", Why Have They Failed to Obtain Wage Deduction Authorizations? Were Petitioners' contention that the exactions here are "membership dues" valid, Petitioners can readily avoid violation of statute simply by obtaining and using dues deduction authorizations under a labor contract providing for dues-check-offs (§302(c) of the Act).

XVIII. The N. L. R. B. Decisions Cited by Petitioners do not Justify the Form B Contract; and in any Event that form is Irrelevant Here. The N. L. R. B. has not held "that by virtue of the Form B contract the purchaser of the music is the employer." (P. p 22; the four cases there cited by Petitioners hold no such thing: Three of the four do not even involve the Form B contract nor an AFM union.) *Respondent does not use that form.* The Petition asserts: "Respondent as leader used the Standard Form B Contract" (P. p 21), as if to intimate recent use. The uncontradicted evidence is that Cutler has not used that form since 1960 (S. M. 134-137; 172). The Form B Contract and its analysis appear in Appendix D of this Brief. Petitioners complain that the Trial Court "did not discuss the applicability of the Form B Contract" (P. p 7). Since Cutler did not use the "Form B Contract", there was no reason for the Trial Court to discuss it in this (the Cutler) case.

XIX. There is no Basis for Exercise of this Court's Supervisory Powers. Petitioners seem to argue (Petition, p 14) as if the Trial Court had found that "the money [for the exactions paid by Cutler and demanded of him by Petitioners] came from the earnings of all the performers". The Trial Court did no such thing. Nor would it have changed the result below if the Trial Court had in fact made such a finding, in view of the absence of wage deduction authorizations. Only because the Court of Appeals *assumed*, say Petitioners, a finding by the District Court that the money came *out of the employer's pocket*, was the Court of Appeals able to affirm the District Court's judgment. *If the Court of Appeals had agreed with the District Court on the facts, the Court of Appeals would have disagreed with the District Court on the law.* So runs Petitioners' argument! As the Counterstatement shows (pp 6-10, *supra*), *the money did come out of the employer's (Cutler's) pocket.* Whether the exactions came from his sidemen or from Cutler himself or from both, Petitioners wanted them paid in violation of the clear prescriptions of §302 of the Act. If the money used by Cutler to pay the exactions constituted, *arguendo*, *wage deductions*, Cutler still had no right to make such deductions without (a) wage deduction authorizations signed by his employees and (b) a check-off agreement between Cutler and the Union representing his employees.

XX. First Amendment Freedom of Association is not here Involved. As a reason for granting the Writ, Petitioners urge that §302 has been construed below "in a manner * * * inconsistent with * * * freedom of association * * * ". Just how this freedom is jeopardized Petitioners do not specify. They contend "that, properly interpreted, §302 prohibits payments only when the employer [Cutler] acts *qua* employer, not when he acts as a union member"! Petitioners give Cutler two hats—one as a *union member* and one as an *employer*—and they admit that Cutler violates §302 if he pays their exactions while wearing the *employer hat;* but not if he pays the *same exaction* while wearing the *union-member hat!* (Such a ludicrous theory of statutory construction belongs in plays like "*The Mikado.*") Then they say that a law or ruling forbidding Cutler from wearing these two bonnets abridges freedom of association!

Conclusion.

The petition for certiorari should be denied with costs.

Respectfully submitted,

Godfrey P. Schmidt,
Counsel for Respondent,
60 East 42nd Street,
New York 17, N. Y.

Dated: October 14, 1963.

Appendix A.

Opinion.

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 108-111—September Term, 1961.

(Argued September 28, 1961 Decided October 17, 1961.)

Docket Nos. 27013-16.

Joseph Carroll, Charles Peterson and Charles Turecamo, as Treasurer, Orchestra Leaders of Greater New York,

Plaintiffs-Appellants,

—v.—

American Federation of Musicians of the United States and Canada, Herman D. Kenin, as President of said Federation, Stanley Ballard, as Secretary of said Federation, and George V. Clancy, as Treasurer of said Federation, Associated Musicians of Greater New York, Local 802, and Al Manuti, as President of Local 802, Max L. Arons, as Secretary of Local 802, and Hy Jaffe, as Treasurer of Local 802,

Defendants-Appellees.

Before:

Lumbard, *Chief Judge*,
Friendly and Smith, *Circuit Judges*.

Plaintiffs appeal from the denial by the District Court for the Southern District of New York, Edmund L.

Palmieri, *J.*, of a temporary injunction to restrain certain practices of musicians' unions and their officers. Reversed to extent indicated, otherwise affirmed.

GODFREY P. SCHMIDT, New York, New York, *for Plaintiffs-Appellants.*

DAVID I. ASHE (Ashe & Rifkin), New York, New York, *for Defendants-Appellees.*

FRIENDLY, *Circuit Judge*:

Plaintiffs are orchestra leaders and members of an unincorporated association known as Orchestra Leaders of Greater New York; they also are members of defendant American Federation of Musicians of the United States and Canada, an international union, and of the New York local, defendant Associated Musicians of Greater New York, Local 802, as, allegedly, union rules require them to be. The business of plaintiffs and the other orchestra leaders they claim to represent is the "single engagement" field. This consists of single performances on occasions such as weddings, college or high school dances, business conventions, club entertainments and the like, in contrast to the "steady engagement" field where musicians are hired on a long-term basis by employers such as television stations, hotels, restaurants, night clubs, and opera or symphony associations. In the "single engagement" field, the person or organization desiring the performance solicits, or is solicited by, an orchestra leader; the latter in turn obtains the musicians, called sidemen, who are to assist in fulfilling the engagement.

Plaintiffs on behalf of themselves and other orchestra leaders have brought four actions against the defendant unions and the latter's officers in the Southern District of New York, which have now been consolidated for trial. One of these, *Carroll v. Associated Musicians of Greater New*

York, challenged a welfare fund promulgated by Local 802 as violating §302 of the Labor-Management Relations Act, 29 U. S. C. §186; a temporary injunction granted by Judge Dimock, 183 F. Supp. 636 (S. D. N. Y. 1960), was affirmed by this Court, 284 F. 2d 91 (2 Cir. 1960). Two actions attacked the unions' practices of establishing price lists and employment quotas as violating the antitrust laws; a motion for a preliminary injunction in one was denied by Judge Bryan in October, 1960, and a similar motion in the other was marked off for excessive adjournment in January, 1961. The fourth action challenged, under §302 of the Labor-Management Relations Act, a "tax," at one time 2% and later reduced to 1½%, which a by-law of Local 802 required leaders to deduct from amounts received for the services of members and pay to the Local, and a 10% "traveling surcharge," which Article 15 of the Constitution of the International required leaders to add to the price of engagements played by members outside the jurisdiction of their home local and pay to the International.

Plaintiffs' motion, dated March 21, 1961, which has given rise to the order here under review, was entitled in all four actions. It sought a temporary injunction against collection of the "tax" and the "traveling surcharge," and also against the defendants' visiting upon plaintiffs and other orchestra leaders "any economic or other reprisals (except expulsion from union membership or other purely intra-union penalty) because of their participation in the above-entitled actions or because of their failure to comply with the union laws and regulations whose legal validity is challenged in the complaints in the above-entitled actions; and from interfering, directly or indirectly, in any way whatsoever, with the business, employment, engagements, jobs or work opportunities of plaintiffs or the class they represent, and from precluding interrupting or interfering with the rights of plaintiffs or any of them to work as musicians in any place or upon any job or engagement whatsoever." Judge Palmieri denied the motion, holding that "Complex and weighty issues of law and of fact are presented in these suits and serious economic interests of both sides are at stake," that "The voluminous papers submitted on these motions emphasize the need for a thorough and careful appraisal of the facts by a trial court"; that "the injunctions sought by the plaintiffs would disrupt strongly entrenched practices and procedures of the defendants with consequent uncertainty as to work and compensation patterns affecting many thousands of members belonging to the defendant unions"; that if a trial should result unfavorably to the plaintiffs, "there would be no adequate way to repair the harm done or account for the wages and jobs that may have been lost"; and that "the immediate benefit that could accrue to the plaintiffs by the granting of threshold injunctive relief does not outweigh the corresponding detriment that would be suffered by defendants should plaintiffs fail to prove their claims." Plaintiffs appeal from this denial, 28 U. S. C. §1292(a)(1).

These reasons for refusing interlocutory relief that would interfere with the long-established system for establishing wage scales and employment quotas appear entirely sound. However, we are unable to find similar basis for refusing the injunction with respect to the "tax" or the "traveling surcharge" or to "reprisals" for failing to make such payments.

Section 302(a) of the Labor-Management Relations Act, as amended by §505 of the Labor-Management Reporting and Disclosure Act of 1959, makes it "unlawful for any employer * * * to pay, lend, or deliver, or to agree to pay, lend, or deliver, any money or other thing of value * * * to any representative of any of his employees who are employed in an industry affecting commerce," or "to any labor organization, or any officer or employee thereof" which represents any such employees. Although defendants deny that the orchestra leader is the "employer" of the sidemen and claim the father of the bride is the true employer, as indeed the contract form says, we think this contention, far from being serious or difficult, borders on the frivolous for reasons stated in another connection by the Court of Claims in *Cutler v. United States*, 180 F. Supp. 360, 362 (1960),—an opinion followed by Judge Dimock in his decision in *Carroll v. Associated Musicians of Greater New York*, *supra*, which we affirmed. There is, of course, no denial that the defendant unions are representatives of employees and are labor organizations representing employees.

Hence the only remaining question with respect to the applicability of §302(a) to the tax and the surcharge is whether the "single engagement" field is "an industry affecting commerce." The verified complaints, incorporated by reference in the motion, alleged that plaintiffs and the class they represent "frequently fulfill single engagements outside of the State in which they usually operate and in which their principal offices are located" and that the revenues from such engagements run into millions of dollars a year. The answering affidavits did not challenge this but contented themselves with reliance on this Court's statement on the earlier appeal, 284 F. 2d at 92, that "The degree to which the sidemen employees of the leaders were 'employed in an industry affecting commerce' * * * is an issue which can be more satisfactorily resolved on a full trial of the case." Defendants argue that, just as limitations on the scope of review of interlocutory orders lay behind our affirmance of Judge Dimock's preliminary determination that he was sufficiently satisfied of an effect on commerce, the same limitations require affirmance of what they consider Judge Palmieri's preliminary determination that he was not. Apart from the seemingly capricious results to which this argument leads, it overlooks that the issue with respect to "commerce" in the action relating to the welfare fund was considerably more troublesome than here. What had concerned Judge Dimock and led to our remark as to resolution by a trial was that Local 802's welfare fund regulations applied only to engagements within New York City and Nassau and Suffolk Counties, in New York state, 183 F. Supp. at 638; there was thus a question whether activities of the industry crossing state lines could be considered. Here there is no such question.

The Local's by-law imposing the "tax" and the provision of the International's Constitution imposing the "traveling surcharge" are not limited to engagements within the state; indeed, the latter applies only to engagements outside the Local's own jurisdiction, many, if not most, of which would be outside the state of New York. The case with respect to interstate commerce is thus immeasurably stronger than that before Judge Dimock; and if we were preliminarily satisfied of an effect on commerce there, we must surely be so here. We hold that defendants have thus far failed to raise any substantial issue that these two impositions did not relate to "an industry affecting commerce," *United States* v. *Shubert*, 347 U.S. 222 (1955).

It follows that, on the showing before the District Judge, the tax and the surcharge violated §302(a)[1] unless they came within one of the exceptions of §302(c). The only exception in any wise pertinent is subsection (4) which permits an employer to deduct from wages money constituting "payment of membership dues in a labor organization: Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment * * *" From what we have before us it would seem indeed that the "tax" imposed by the Local's by-law may have constituted the payment of membership dues although not denominated as such; however, defendants did not bring themselves within the exception since there were no written authorizations. Normally the 10% "traveling surcharge" is divided by the International three ways: 4/10ths goes to the local in whose jurisdiction the engagement was played, 4/10ths is retained by the International, and 2/10ths is paid to the members who played the engagement. The distribution to the local and to the employees themselves would seem quite clearly not to constitute membership dues. We are unable to determine from the material before us whether the payment to the International would be such but in any event no written authorizations were furnished.

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[1] This is subject to possible qualification with respect to so much of the 10% "traveling surcharge" as ultimately went to the performers themselves, with the International acting only as a conduit, a question we find unnecessary to decide.

The general considerations marshalled by the District Judge against the grant of temporary injunctive relief, which we find persuasive with respect to the union provisions as to salary scales and employment quotas, do not appear pertinent to the collection of the apparently illegal "tax" and "surcharge"; doubtless the sheer mass of papers and argument tended to distract the judge's attention from this single aspect of the case. It is true that plaintiffs apparently suffer no out-of-pocket loss from the tax and the surcharge on the sidemen, since the tax is deducted from the musicians' salaries and the surcharge is added to the price to the customer; however, if plaintiffs are right as to the illegality of these payments, as they seem to be, their conduct renders them subject to §302(d), which makes them guilty of a misdeameanor carrying a fine of not more than $10,000, or imprisonment for not more than a year, or both. Defendants suggest that this sensitivity of the plaintiffs to criminal liability is somewhat recent; however, a court of equity ought not deny interlocutory relief to a person seeking its aid in terminating his criminal conduct simply because repentance has been late and may not have been motivated solely by respect for law. Neither will an injunction relating only to these payments entail the destructive consequences on employment feared by the District Judge; such detrimental effect as the injunction might otherwise have on the unions can be substantially cushioned by a provision, suggested by him and accepted by plaintiffs, that the amounts claimed by defendants to be collectibie as "tax" and "surcharge" shall be paid into escrow, and by a further provision that the "tax" should continue to be paid directly to the Local to the extent that leaders are furnished with written authorizations complying with §302(c).

Since plaintiffs were entitled to an injunction against being required to pay the apparently illegal tax and traveling surcharge, they were likewise entitled to protection against interference for failing to make such payments. They complain also of the denial of an injunction against reprisals for instituting and prosecuting the four actions. Appellees say there have been none for that cause, the only disciplinary action taken against plaintiffs and consequent threats to them having stemmed from nonpayment of the "tax" and "traveling surcharge" or other breaches of union regulations. Appellants' evidence does not negate this sufficiently to warrant us in reversing the denial of the broader injunction sought. An injunction limited to the payments and to reprisals for failure to make them, which should also direct appellees to retract any threats to musicians and prospective customers already made on that ground, is all that has been clearly shown to be required; if defendants should attempt reprisals against the plaintiffs for bringing or prosecuting the actions, a further application can be made and relief promptly given.

In holding that a temporary injunction should have issued to the extent indicated, we are not unmindful that, as Judge Sanborn stated a half century ago, it is "to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?" *Love v. Atchison, T. & S. F. Ry.*, 185 F. 321, 331 (8 Cir. 1911). However, that does not mean that denial of a temporary injunction is to be free from review. Congress would scarcely have gone to the pains of amending the Evarts Act, 26 Stat. 826, 828 (1891), which had provided interlocutory review over the grant or continuance of injunctions as an exception to the general requirement of finality, so as also to include their denial, 28 Stat. 666 (1895),[2] and then of repeating the process when it enacted §129 of the Judicial Code of 1911, 36 Stat. 1134, modifying 31 Stat. 660 (1900) in this respect, unless it had thought that meaningful duties were being imposed upon the Courts of Appeals. Moreover, as said by Chief Judge Magruder, " 'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *In re Josephson*, 218 F. 2d 174, 182 (1 Cir. 1954); see, to much the same effect, Judge Learned Hand in *Barnett* v. *Equitable Trust Co.*, 34 F. 2d 916, 920 (2 Cir. 1929). In *Ring* v. *Spina*, 148 F. 2d 647 (2 Cir. 1945), this Court reversed the denial of a temporary injunction founded on what the Court tentatively considered an erroneous view of the law; such a reversal occurred also in *Perry* v. *Perry*, 190 F. 2d 601 (D. C. Cir. 1951), where the denial below had been predicated on what the Court of Appeals regarded as an unduly restrictive interpretation of a contract. See also *National Grain Yeast Corp.* v. *City of Crystal Lake*, 147 F. 2d 711 (7 Cir. 1945); *Chicago, R. I. & P. R.R.* v. *Switchmen's Union*, 292 F. 2d 61, 71 (2 Cir. 1961). Such considerations and authorities suffice to support reversal of the order to the limited extent of directing issuance of a temporary injunction consistent with this opinion; the detailed framing of the injunction is properly left to the District Judge. In order to expedite the entry of such an injunction, the mandate will issue forthwith.

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[2] This was done because the implications of "the lack of all review over the action of a single judge in denying interlocutory injunctions," "had not been adequately considered." Frankfurter and Landis, The Business of the Supreme Court, 108-109.

Appendix B.

Article 15—10% Traveling Surcharge.

SECTION 1. All engagements of one week or more played by members outside of the jurisdiction of their home Local and all tours of one week or more are considered TRAVELING ENGAGEMENTS.

NOTE—It is understood that a week shall consist of five, six or seven days.

SECTION 2. All engagements of less than one week played by members outside of the jurisdiction of their home Local are considered MISCELLANEOUS OUT-OF-TOWN ENGAGEMENTS.

SECTION 2-A. Any orchestra composed of members of more than one local shall be considered an orchestra playing a "Traveling" or "Miscellaneous out-of-town" engagement, and is hereby subject to the 10% Traveling Surcharge. The Surcharge applies even though the engagement takes place in the jurisdiction in which the leader is a member.

The 10% Traveling Surcharge shall NOT apply when engagement is exempt under provisions of Article 15, Section 3.

The 10% Traveling Surcharge shall NOT apply where permission is granted to a leader to use members of other locals under provisions of Article 12, Section 9.

SECTION 3. An additional 10% based on the price of the Local in whose jurisdiction the engagement is being played shall be added to the price of all TRAVELING and MISCELLANEOUS OUT-OF-TOWN ENGAGEMENTS. Exempt from this 10% additional charges are the following:

Symphony Orchestras.
Concert Orchestras.
Opera Engagements.
Traveling Theatrical Tours.
Theatre Engagements.

Rodeo and Circus Engagements.
Military, Concert or Brass Bands.
Radio and Television Engagements.

Picnic Engagements which originate in the jurisdiction of a Local that has no picnic grounds or where picnic grounds are not available and which shall be considered a Local engagement governed by the prices and conditions of home Local.

Political Tours of a candidate within the confines of his own state.

Fair and carnival engagements, excepting that part of these engagements which are played for dancing and to which the 10% surcharge shall apply.

Section 4. The 10% charge shall apply to arrangers and copyists who are not employed as instrumentalists, and also applies to conditions on the engagement, such as overtime, doubling on instruments, room and board allowance, etc.

Section 5. The 10% surcharge shall not apply to the Local's charge for wearing apparel and shall not apply to additional price list charges for and where members furnish electric organs or other specialized and expensive equipment.

Section 6. Wherever a steamer or pleasure boat remains on location at any dock for one week or more, and whenever the cruises of such steamer or pleasure boat are without destination, or whenever such steamer or pleasure boat is used for daily excursions, returning the same day to the port in which it is located, then, even though during such excursion the steamer or pleasure boat touches more than one port, the members playing on such steamer or pleasure boat are governed by all the rules and regulations governing traveling orchestras, and the Local where the original port is located shall collect dues and the 10% surcharge

SECTION 7. Locals must collect the additional 10% from orchestra leaders playing engagements in their jurisdictions that come under the 10% charge and shall immediately forward same to the International Treasurer, who shall make the following disbursements of said 10%:

Four-tenths to the Local in whose jurisdiction the engagement was played, except in case where no effort was made by the Local to collect.

Four-tenths to the Federation.

Two-tenths to the members who played the engagement.

SECTION 8. In case a Local fails to collect the 10%, the orchestra leader from whom it should have been collected is then obliged to send same direct to the International Treasurer.

SECTION 9. In cases where the Treasurer collects the 10% direct and the Local made efforts to collect same but failed and so advised the Treasurer, he shall then furnish the Local with a statement showing from whom the collection was made and, if possible, the names of the members of the orchestra and the total amount paid by the same.

SECTION 10. If a leader is found guilty of unlawfully retaining money that is returned to him by the Treasurer for transmission to members of the orchestra he shall be expelled.

SECTION 11. A traveling orchestra playing steady engagements, or a traveling orchestra on tour for one week or more, playing single engagements, must charge the price of the Local in whose jurisdiction they are playing, plus 10%. Exempt from this law are those engagements named in Article 15, Section 3, and any traveling steady engagement covered by a National scale.

SECTION 12. An orchestra playing miscellaneous out-of-town engagements in the jurisdiction of a Local which maintains the same price or a lower price than their own Local must charge the price of their own Local plus 10% of the price of the Local in whose jurisdiction they are playing.

SECTION 13. An orchestra playing miscellaneous out-of-town engagements in the jurisdiction of a Local which maintains a higher price than their own Local, must charge the price of the Local in whose jurisdiction they are playing, plus 10% of the price of the Local wherein playing.

SECTION 14. An orchestra playing three or four engagements per week for continuous weeks in a jurisdiction of a Local other than their own must charge the price of the Local in whose jurisdiction they are playing, plus 10%.

SECTION 15. A leader who plays a traveling or miscellaneous out-of town engagement or engagements, and fails to pay his ten per cent surcharge, shall be subject to a penalty of not more than $50.00 for each offense, which shall be in the discretion of the International Treasurer. After leader has been notified and has failed to pay the taxes owing plus the penalty he shall be considered as having resigned from the Federation, and the local to which he belongs is obliged on receipt of notice from the International Treasurer, to strike his name from its membership list. To become reinstated such resigned member must pay all arrearages in taxes and fines and in addition shall pay a National Reinstatement Fee or meet such conditions as the International Executive Board may determine.

SECTION 16. In all cases in which members of traveling orchestras authorize the International Treasurer to deduct the amount of the tax due from the 10% of the price of the engagement on deposit with him, the Treasurer shall have the authority at his own option to do so or insist that the tax be sent him when due.

SECTION 17. Prices to be paid to local members who augment traveling orchestras during time that such orchestras visit jurisdiction of their Local are governed by rules of the Local except on such engagements for which the National law makes proviso that 10% in excess of the local price must be charged. In such cases the local members augmenting a traveling orchestra must receive the additional 10% of all charges as hereinafter provided.

SECTION 18. Every Local will be obliged to report to the International Treasurer every traveling orchestra or Local out-of-town orchestra playing in its jurisdiction, also whether traveling members' taxes are paid up to date. A Local is responsible for its officers to investigate traveling orchestras, and in the event it fails to have the stipulations of this law carried out, it shall be fined Twenty-five ($25.00) Dollars in each individual case.

Appendix C.

Standing Resolutions.

Resolved, That effective as of October 1, 1943, until December 31, 1960:

(a) There shall be payable by and collected from all members, a 1 per cent tax on all engagements based on scale price therefor;

(b) Said 1 per cent tax shall likewise be levied on all salaries paid to officers of our local and to all members thereof regularly employed by the Union;

(c) All income realized from items (a) and (b) above mentioned shall be allocated to the General Fund of our local.

Effective as of October 15, 1955, until December 31, 1960:

(a) There shall be payable by and collected from all members an additional 1 per cent tax on all engagements based on scale price therefor;

(b) Said additional 1 per cent tax shall likewise be levied on all salaries paid to officers and to all Local 802 members thereof regularly employed by the Union:

(c) All incomes realized from items (a) and (b) above-mentioned shall be allocated as follows:

1. ¼ (one-fourth) of 1 per cent to be set aside for the purpose of continuing the campaign for live music.

2. ¼ (one-fourth) of 1 per cent to be set aside for a strike fund.

3. ½ (one-half) of 1 per cent to be allocated to the General Fund of our local to take care of the rising costs of administering the affairs of Local 802.

(Note: On all engagements there is payable a total of 2 per cent tax until December 31, 1960.)

Effective as of January 1 1961: The 2% Tax payable on all engagements be reduced ½ of 1%. Therefore, on all engagements there is payable a total of 1½% tax to the General Fund. The leader shall be held responsible for the collection and payment of this tax.

There be no further specific allocation of ¼ of 1% to the Live Music Fund and no further specific allocation of ¼ of 1% to the Strike Fund.

(a) There shall be payable by and collected from all members a 1½ per cent tax on all engagements based on scale price, therefore: Leaders shall be held responsible for the collection and payment of this Tax.

(b) Said 1½ per cent tax shall likewise be levied on all salaries paid to officers of our local.

(c) All income realized from items (a) and (b) abovementioned shall be allocated to the General Fund of our local.

Appendix D.

Form B Contract and Analysis.

(Plaintiffs' Exhibit 13, March 5, 1962, S. M. 134-135.)

(Opposite ☞)

SINGLE ENGAGEMENT

Contract Blank

Associated Musicians of Greater New York

LOCAL 802, AMERICAN FEDERATION OF MUSICIANS, NEW YORK 19, N. Y.

THIS CONTRACT for the personal services of musicians, made this __________ day of ____________________, 19_____, between the undersigned employer (hereinafter called the "employer") and ____________________ (Including the Leader) musicians (hereinafter called "employees").

WITNESSETH, That the employer hires the employees as musicians severally on the terms and conditions below. The leader represents that the employees already designated have agreed to be bound by said terms and conditions. Each employee yet to be chosen shall be so bound by said terms and conditions upon agreeing to accept his employment. Each employee may enforce this agreement. The employees severally agree to render collectively to the employer services as musicians in the orchestra under the leadership of ______________________________ as follows:

Name and Address of Place of Engagement ____

Date of Employment ____________________________ **Welfare** __________ **Cartage** __________

Type of Engagement ____________________________ Name of Room ____________________

Hours of Employment ____________________________ Doubling ____________________

____________________________ Mileage and Transp. ____________________

Price Agreed Upon: $ ____________________ OVERTIME $ ____________________ per hour or part thereof

In the event there is a SHOW of more than 20 Minutes (Cumulative time) to be played, said SHOW must be played by the entire Orchestra, and there will be an additional charge of $ ________________ for playing of said SHOW, exclusive of Rehearsal time.

TOTAL PRICE AGREED UPON $ ____

This price includes expenses agreed to be reimbursed by the employer in accordance with the attached schedule, or a schedule to be furnished the employer on or before the date of engagement.

To be paid ____
(Specify when payments are to be made)

Upon request by the American Federation of Musicians of the United States and Canada (herein called the "Federation") or the local in whose jurisdiction the employees shall perform hereunder, the employer either shall make advance payment hereunder or shall post an appropriate bond.

ADDITIONAL TERMS AND CONDITIONS

If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services. The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. [illegible] behalf of the employer the leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each [illegible]yee, including himself. The amount paid to the leader includes the cost of transportation, which will be reported by the leader to the employer.

All employees covered by this agreement must be members in good standing of the Federation. However, if the employment provided for hereunder is subject to the Labor-Management Relations Act, 1947, all employees, who are members of the Federation when their employment commences hereunder, shall be continued in such employment only so long as they continue such membership in good standing. All other employees covered by this agreement, on or before the thirtieth day following the commencement of their employment, or the effective date of this agreement, whichever is later, shall become and continue to be members in good standing of the Federation. The provisions of this paragraph shall not become effective unless and until permitted by applicable law.

To the extent permitted by applicable law, nothing in this contract shall ever be construed so as to interfere with any duty owing by any employee hereunder to the Federation pursuant to its Constitution, By-laws, Rules, Regulations and Orders.

Any employees who are parties to or affected by this contract are free to cease service hereunder by reason of any strike, ban, unfair list order or requirement of the Federation, and shall be free to accept and engage in other employment of the same or similar character or otherwise, for other employers or persons without any restraint, hindrance, penalty, obligation or liability whatever, any other provisions of this contract to the contrary notwithstanding.

Representatives of the local in whose jurisdiction the employees shall perform hereunder shall have access to the place of performance (except to private residences) for the purpose of conferring with the employees.

The performances to be rendered pursuant to this agreement are not to be recorded, reproduced, or transmitted from the place of performance, in any manner or by any means whatever, in the absence of a specific written agreement between the employer and the Federation relating to and permitting such recording, reproduction or transmission.

The employer represents that there does not exist against him, in favor of any member of the Federation, any claim of any kind arising out of musical services rendered for any such employer. No employee will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. If the employer breaches this agreement, he shall pay the employees, in addition to damages, 6% interest thereon plus a reasonable attorney's fee.

The employer, in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein, and, if applicable to the services to be rendered hereunder, acknowledges his liability to provide workmen's compensation insurance and to pay social security and unemployment insurance taxes.

To the extent permitted by applicable law, there are incorporated into and made part of this agreement, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder (insofar as they do not conflict with those of the Federation), and the employer acknowledges his responsibility to be fully acquainted, now and for the duration of this contract, with the contents thereof.

The undersigned, whether signing this contract as principal, agent or otherwise, in order to induce Local 802, A. F. of M., to approve this contract, personally undertakes to pay, and will be principally responsible for the payment of all sums required to be paid hereunder.

undersigned employer (hereinafter called the "employer") and ________________ musicians (hereinafter called "employees").
(Including the Leader)

WITNESSETH, That the employer hires the employees as musicians severally on the terms and conditions below. The leader represents that the employees already designated have agreed to be bound by said terms and conditions. Each employee yet to be chosen shall be so bound by said terms and conditions upon agreeing to accept his employment. Each employee may enforce this agreement. The employees severally agree to render collectively to the employer services as musicians in the orchestra under the leadership of ________________ as follows:

Name and Address of Place of Engagement ________________

Date of Employment ________________ **Welfare** ________ **Cartage** ________

Type of Engagement ________________ Name of Room ________________

Hours of Employment ________________ Doubling ________________

________________ Mileage and Transp. ________________

Price Agreed Upon: $ ________________ **OVERTIME** $ ________________ per hour or part thereof.

In the event there is a SHOW of more than 20 Minutes (Cumulative time) to be played, said SHOW must be played by the entire Orchestra, and there will be an additional charge of $ ________ **for playing of said SHOW, exclusive of Rehearsal time.**

TOTAL PRICE AGREED UPON $ ________________

This price includes expenses agreed to be reimbursed by the employer in accordance with the attached schedule, or a schedule to be furnished the employer on or before the date of engagement.

To be paid ________________
(Specify when payments are to be made)

Upon request by the American Federation of Musicians of the United States and Canada (herein called the "Federation") or the local in whose jurisdiction the employees shall perform hereunder, the employer either shall make advance payment hereunder or shall post an appropriate bond.

ADDITIONAL TERMS AND CONDITIONS

If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services. The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. On behalf of the employer the leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the leader includes the cost of transportation, which will be reported by the leader to the employer.

All employees covered by this agreement must be members in good standing of the Federation. However, if the employment provided for hereunder is subject to the Labor-Management Relations Act, 1947, all employees, who are members of the Federation when their employment commences hereunder, shall be continued in such employment only so long as they continue such membership in good standing. All other employees covered by this agreement, on or before the thirtieth day following the commencement of their employment, or the effective date of this agreement, whichever is later, shall become and continue to be members in good standing of the Federation. The provisions of this paragraph shall not become effective unless and until permitted by applicable law.

To the extent permitted by applicable law, nothing in this contract shall ever be construed so as to interfere with any duty owing by any employee hereunder to the Federation pursuant to its Constitution, By-laws, Rules, Regulations and Orders.

Any employees who are parties to or affected by this contract are free to cease service hereunder by reason of any strike, ban, unfair list order or requirement of the Federation, and shall be free to accept and engage in other employment of the same or similar character or otherwise, for other employers or persons without any restraint, hindrance, penalty, obligation or liability whatever, any other provisions of this contract to the contrary notwithstanding.

Representatives of the local in whose jurisdiction the employees shall perform hereunder shall have access to the place of performance (except to private residences) for the purpose of conferring with the employees.

The performances to be rendered pursuant to this agreement are not to be recorded, reproduced, or transmitted from the place of performance, in any manner or by any means whatsoever, in the absence of a specific written agreement between the employer and the Federation relating to and permitting such recording, reproduction or transmission.

The employer represents that there does not exist against him, in favor of any member of the Federation, any claim of any kind arising out of musical services rendered for any such employer. No employee will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. If the employer breaches this agreement, he shall pay the employees, in addition to damages, 6% interest thereon plus a reasonable attorney's fee.

The employer, in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein, and, if applicable to the services to be rendered hereunder, acknowledges his liability to provide workmen's compensation insurance and to pay social security and unemployment insurance taxes.

To the extent permitted by applicable law, there are incorporated into and made part of this agreement, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder (insofar as they do not conflict with those of the Federation), and the employer acknowledges his responsibility to be fully acquainted, now and for the duration of this contract, with the contents thereof.

The undersigned, whether signing this contract as principal, agent or otherwise, in order to induce Local 802, A. F. of M., to approve this contract, personally undertakes to pay, and will be principally responsible for the payment of all sums required to be paid hereunder.

Employer's Name	Leader's Name	Local No.
Signature of Employer	Signature of Leader	Membership Card No.
Street Address	Street Address	
City / State	City / State	
Phone	Booking Agent	

If this contract is made by a licensed booking agent, there must be inserted on the reverse side of this contract the name, address and telephone number of the collecting agent of the local in whose jurisdiction the engagement is to be performed.

Form B-3a 1-1-59

PRINTED IN U.S.A. 44

12-58

COLLECTING AGENT OF LOCAL

ADDRESS CITY STATE

TELEPHONE

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
(LEADER)			$

Analysis of Appendix D.

The client of the orchestra leader like Cutler is not in fact the employer of the orchestra. The purchaser of the music never really intends, even where he uses the "Form B" Contract, to be employer of the sidemen and the orchestra leader. *Bartels* v. *Birmingham*, 332 U. S. 126. Nor does the orchestra leader thereby intend to make his client the employer of the sidemen and of himself. The statement in the "Contract Blank" to the effect that the "employer" shall have "at all times * * * complete control over the services of employees under this contract" is an artificial and false label, which does not conform with the facts nor with the intention of the parties who execute the Form B "Contract Blank".

(a) The Form B language which designates the orchestra leader's client as the "employer" of both the orchestra leader and his sidemen is inserted in the said "Contract Blank" by Petitioners not because such designation ("employer") is the intention of the contracting parties, nor because in actual fact the client of the orchestra leader ever is or acts like the employer of the entire orchestra, but to shift the incidence of payroll taxes and to evade the antitrust laws of the United States which forbid combinations to fix prices between union officials and union members on the one hand and employers on the other, where collective bargaining and labor contracts are not employed.

(b) The spurious character of the "agreement" of the parties which Petitioners attempt to effectuate by means of the "Form B" Contract blank is apparent from the format and text of that blank. The "Additional Terms and Conditions" thereof are printed in such fine print as to discourage even the most inquisitive from reading them.

(c) Perhaps nothing is more indicative of the unreal "agreement" formally contrived by the "Form B" Contract than:

> "To the extent permitted by applicable law, there are incorporated into and made part of this agree-

> ment, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder."

The Constitution and By-Laws of AFM are set forth in a booklet of 222 pages. The Constitution and By-Laws of Local 802, is set forth in a booklet of some 70 pages. Local 802 now publishes a booklet entitled "Single Engagement Wage Scales and Single Engagement Minimums" (as replacement for the old Price List and Minimum booklets), which comprises 55 pages. Total: 347 pages.

(d) What client has the competence or even the will to dictate the "manner of performance" of an orchestra leader? What client would ordinarily have the ability to select appropriate pieces to be played? What self-respecting orchestra leader would permit the client to dictate his "manner of performance"? What sideman would regard the leader's client as his employer and as the person having the primary right to impose disciplinary measures against him or to give him orders and instructions? The leader, according to the "Form B" Contract is the "agent of the employer" [namely, of the client of the orchestra leader]. This means that the so-called "employer" has the principal right to enforce disciplinary measures for just cause. If the client were to walk up to the piano player or the saxophone player and discharge him or otherwise discipline him for some "just cause" within the client's imagination, would this be tolerated by the sideman, the orchestra leader, or even Petitioners? If the orchestra leader absconded with the money for the performance without paying the sidemen, would the sidemen be entitled to look to the client (who had already paid the leader for the engagement) for their wages? If the client fails to pay the leader and the sideman, Petitioners hold the leader responsible for the wages of the sidemen, even though the leader is, in their theory, just the agent of the client guilty of default. If the orchestra leader signed the "Form B" Contract on the space provided for the "Employer", would that, in Petitioners' logic, make him the employer? If signature in that space by the client is efficacious to make the client an "employer", why does not signature by the leader in that space convert the leader into an employer even under the union argument?

(e) The falsity of the alleged agreements and intentions of the parties appears from:

> "The undersigned, whether signing this contract as principal, agent or otherwise, in order to induce Local 802, A. F. of M., to approve this contract, personally undertakes to pay, and will be principally responsible for the payment of all sums required to be paid hereunder."

Who is or who are "the undersigned"? There is space below for the "employer's name" and also for the "leader's name". Both are "the undersigned". Does this mean that both are "principally responsible for the payment of all sums to be paid hereunder"? Does the client, having paid the orchestra leader, regard himself as principally responsible for the payment of all sums under the "Form B" Contract, where the leader fails to pay?

(f) Nothing could be more unreal than:

> "If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services."

What client has ever done this? What client has ever intended this? What client has the competence or the will to hire sidemen for an orchestra? What client would know whether a cornet or a trombone is needed? What leader actually intends to serve as agent for the client and under the client's instructions when he (the leader) hires sidemen for his own orchestra?

Office-Supreme Court, U.S.
FILED
NOV 12 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 473

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, *Petitioners*,

5

v.

BEN CUTLER, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

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November 12, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY MEMORANDUM

Two recent opinions by District Judge Richard H. Levet,[1] who rendered the District Court opinion in the instant case (Petition, App. B, pp. 7a-35a), further demonstrate that the Court of Appeals misconceived and departed from the critical factual findings of the District Court. They thus confirm the appropriateness of this Court's exercise of its supervisory powers to review and reverse the Court of Appeals' judgment. And these new expressions by the same Judge who ruled in the instant proceeding establish beyond peradventure that the legal question of the construction of § 302 (Question No. 2) is squarely presented by this case. Respondent's efforts to justify the decision below serve only to emphasize the obvious importance of that statutory question. It is to these two questions, the first procedural in nature and the second statutory, that this reply brief will be addressed.[2]

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[1] Ten copies of both of these opinions have been filed with the Clerk for the information of the Court. The very fact that the validity of the two measures upon which respondent predicates his claim of mootness is the subject of pending litigation serves further to demonstrate that the instant litigation is far from moot. Petitioners must continue to insist that the actions herein challenged are valid and that, if these other measures fail, they are free to return to those practices. "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43; here, even the eventuality of voluntary discontinuance has been put in jeopardy by these pending suits.

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[2] With respect to the importance and substantiality of Questions Nos. 3 and 4 we need add nothing to the Petition. Respondent asserts that he is not using the Form B Contract (Opp., p. 22). Neither court below so found and respondent did not so urge in the court below. Respondent again claims that the *Cutler* v. *United States* tax case is determinative of his "employer" status under the Taft-Hartley Act, a position which can be maintained only by disregarding the plain legislative history of the Taft-Hartley Act and the decisions cited at Pet., p. 22, which respondent plainly has misread (Opp., p. 23, para. XVIII).

Respondent's assertion regarding his activities in interstate commerce (Opp., p. 4) are likewise unsupported by any factual findings. Since the District Court made painstaking findings in this as well as other issues, it is fair to assume that the evidence did not justify respondent's claim. Respondent did not contend in the Court of Appeals that the District Court's findings were inaccurate or inadequate. The lengthy opposition nowhere disputes that the Court of Appeals' unprecedented expansion of the commerce power, as properly presented in the Petition, requires this Court's attention.

I

In the first of the two cases in which these opinions issued, *Schwartz, et al. v. Associated Musicians of Greater New York, Local 802, and the American Federation of Musicians*, No. 63 Civ. 2442, S.D.N.Y., the plaintiffs asserted that Local 802's new 1½% local tax, adopted in light of the judgment rendered in the instant case, was violative of § 302 of the Labor-Management Relations Act even though the tax is to be collected directly from the members themselves. On October 30, 1963, Judge Levet issued an opinion and judgment granting summary judgment against the plaintiffs. The portions of that opinion which indicate the gross error of the Court of Appeals in the instant case read as follows:

> All of the challenges center about whether the Local taxes are membership dues and thus an obligation of the sidemen or whether they are solely the obligation of the leader. As the chronology of the tax shows, from October, 1943 to October, 1955 the resolutions made it clear that the tax was 'to be payable by and collected from all members.' The standing resolution which became effective January 1, 1961 repeated the language that the Local tax was 'payable by and collected from all members,' but went on to provide that the '[l]eaders shall be held responsible for the collection and payment of this Tax.' Although the wording in the light of present events is perhaps somewhat inartistic, it would appear that *the Local tax is, and has been since October, 1943, an obligation of the membership. The Local, for reasons best known to itself, chose in 1961 to make the orchestra leader its agent for collection. Yet, the obligation, while perhaps initially the leader's for ease of collection, remained ultimately that of the sideman.* [Emphasis added.]

* * *

> The major thrust of the plaintiffs' argument is that the resolution of September 26, 1960 made the Local tax the obligation of the leader and the present methods of direct collection of the tax from members beginning in December, 1962 transformed that obligation to the membership without the statutory prerequisites. Again, resort mu[st] be had to the history of the tax to determine whose obligation it was on September 14, 1959, the effective date of Section 101(a)(3), 29 USC §411(a)(3).
>
> In 1959, the standing resolutions did not mention the leader and read simply that the tax shall be 'payable by and collected from all members.' *This language would dispel any contention that the obligation was upon any one other than the members.* The introduction, effective January 1, 1961, that 'The leader shall be held responsible for the collection and payment' of the tax did not change the nature of the obligation. The change can best be described in legal parlance as making the leader the agent for collection and, in effect, secondarily liable, while leaving the primary liability with the membership. Since the nature of the obligation did not change, there was no violation of Section 101(a)(3) when the union sought to collect the tax directly from the members by either direct billing or check-off authorizations. [Emphasis added.]

Likewise, on October 28, 1963, Judge Levet issued an opinion in the related case denominated *Wittstein, et al.* v. *American Federation of Musicians*, No. 63 Civ. 2548, S.D.N.Y., in which the respondent Cutler is a named plaintiff. Judge Levet there held that the Federation's convention procedure in adopting an increase in the per capita dues of Federation members, an increase designed to replace the traveling surcharge tax outlawed in the instant case, violated the Labor-Management Reporting and Disclosure Act of 1959. 29 U.S.C. § 411(a)(3)(B)(i). In the course of that opinion, which is the subject of an appeal pending before the Court of Appeals for the Second Circuit, Judge Levet made the following comments pertinent to the instant case:

> In order to place the action of the convention in its proper reference, it is necessary to briefly review the legal history of the Federation's 10% traveling surcharge. *Article 15 of the Federation's By-laws requires that Federation members who perform a 'miscellaneous out-of-town engagement' be paid, but not to actually receive, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place.* This additional amount is known as the 'traveling surcharge.' The orchestra leader does not actually turn over the additional 10% to his musicians (sidemen) because Federation By-laws provide that the local in whose jurisdiction such engagement is performed must collect the travelling surcharge from the orchestra leader and transmit the amount to the Federation. Should the Local fail to collect the surcharge from the leader, the leader is required to transmit the surcharge directly to the Federation. [Emphasis added.]

Thus in both the *Schwartz* and *Wittstein* cases, Judge Levet iterates and reiterates what is the basic and uncontestable fact in this case—that the work taxes here in issue are *a membership obligation of the sidemen* and that the leader does nothing more than act as the union's agent for collection. To say, as the Court of Appeals said, that this obligation is payable out of the pocket of the leader is to ignore the plain and uncontested findings of Judge Levet in the instant case (see Petition, pp. 12-13) and to transform the whole nature of the legal question properly presented by the true facts for review.

Moreover, in *Carroll v. Associated Musicians of Greater New York*, 316 F. 2d 574 (C.A. 2), rendered the same day as the decision in the instant case, the Court of Appeals itself recognized that the transmittal of the moneys here involved was solely an obligation of union membership. There the Court of Appeals affirmed the District Court's ruling that two orchestra leaders who had previously performed the same functions as the respondent Cutler "had no standing to challenge the union exactions because they are no longer members of the union and the exactions are required only of members." 316 F. 2d at 575.

Even the respondent now in effect concedes the critical factual error of the Court of Appeals. This concession is clear despite respondent's confusion (Opp., p. 22) as to whether this error was one of fact or law and despite his belated effort (Opp., p. 22) to assert for the first time that, if the facts be as the District Court found them to be, the findings were "not basic" and were clearly erroneous. The important point is that respondent himself repeatedly underlines the factual misapprehension of the Court of Appeals by admitting that Cutler actually "deducted the amount of the 'local taxes' . . from the wages he paid to sidemen" (Opp., p. 7), and by asserting (Opp., pp. 12, 13, 14, 19, 23) that the petitioning unions should have obtained check-off authorizations from the sidemen *for the deductions from their wages.*

The error of the Court of Appeals is too plain and too fundamental to be cast aside as involving no more than a factual complaint by a disappointed litigant. The error goes to the very integrity of the appellate process, a process which is designed to give all litigants their day in court and an opportunity to secure review of lower court judgments on the basis of the facts and issues there developed. This Court has emphasized time and again the impropriety of an appellate resolution of a case "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." *Fountain v. Filson*, 336 U.S. 681, 683; see also *Globe Liquor Co. v. San Roman*, 332 U.S. 571; *Cone v. West Virginia Paper Co.*, 330 U.S. 212. The flagrant abuse of the appellate power in this case calls for the exercise of the supervisory powers of this Court. See *Letulle v. Scofield*, 308 U.S. 415, 416; *Aratani v. Kennedy*, No. 321, Oct. Term, 1963, certiorari granted, October 21, 1963 (see Question No. 4 in Petition).

II

Once this Court exercises its power to remove the factual misconception of the Court of Appeals, there emerges the underlying question whether § 302 makes it a crime for a union to collect money from employer-members on an equal footing with moneys collected from all other members. The respondent's Brief in Opposition serves to emphasize the critical importance of this § 302 issue.

In scoffing (Opp., pp. 24, 25) at the view that § 302 prohibits payments only when an employer is acting as an employer, not when he acts as does any other union member, respondent poses what has been from the beginning the central issue of this litigation. Unless the term "employer" in § 302 is limited to its intended context—to denote an individual while acting as an economic adversary of the union rather than extended to the individual dealing with his own union in the course of the normal member-union relationship—§ 302 is recast into a blanket prohibition of the payment to unions of employer-members' dues and other financial membership obligations. Respondent contends (Opp., p. 23) that "it simply does not matter 'that the transmittal is performed solely as a union obligation.'" But if such an expansion of § 302 be accepted, as the courts below accepted it, the time-honored practice of many unions in accepting dues from employer-members becomes criminal.[3]

This problem of statutory interpretation is indeed one of national scope, affecting innumerable union practices apart from those of petitioners. And the fact (see Opp., p. 15) that these unions have not significantly suffered since the adoption of § 302 in 1947 only emphasizes the novelty of the ruling below; up until now no court has even intimated that § 302 should be interpreted or applied so as to affect these legitimate union interests.

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[3] In *Labor Board v. Hearst Publications*, 322 U.S. 111, 127, n. 26, this Court expressly recognized "The practice of self-organization and collective bargaining to resolve labor disputes has for some time been common among such varied types of 'independent contractors' as musicians . . . and such atypical 'employees' as insurance agents, artists, architects and engineers."

The International Typographical Union, the oldest national labor organization in the United States, is one of the many unions accepting employers as members and accepting dues from them. "In many small print shops the owner himself is a union member, and in the smallest shops he may even work at the trade in the old craft tradition of the master surrounded by his journeymen." Lipset, Trow and Coleman, *Union Democracy* 152 (1956).

Respondent recognizes that implicit in his assault upon the unions' right to impose financial membership obligations on employer-members is a challenge to the legality of their membership itself. He justifies the decision below by asserting (Opp., p. 17) that "petitioners have no legitimate interest in having members like Cutler, whose very union membership constitutes a combination in violation of antitrust." But this assertion springs from a misreading of the decision in *Los Angeles Meat Drivers' Union* v. *United States*, 371 U.S. 94, and its express recognition that unions "often have a legitimate interest in soliciting self-employed entrepreneurs as members."[4] But the mere fact that respondent is driven to this position underscores the national significance of the question presented. The interpretation of § 302 rendered in the courts below, and repeated here by respondent, strikes at the vitals of union membership policies. For if it is a crime for an employer member to pay dues or other monetary obligations to his union, then § 302 indeed outlaws, as respondent asserts, any "legitimate interest

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[4] Respondent mistakenly relies on the fact that the grease peddlers in the *Los Angeles Meat Drivers' Union* case were self-employed and did not hire other drivers. The controlling factor, however, was the absence "of any actual or potential wage or job competition, or of any other economic interrelationships, between the grease peddlers and the other members of the union" (371 U.S. at 98)—thereby justifying a decree divesting the grease peddlers of the union membership in the circumstances of the case. But in the instant case respondent Cutler concededly performs on an instrument, Opp., pp. 4, 16, and competes for engagements with other union members; indeed, conducting is itself a musical function. Thus the petitioning unions have a legitimate interest in having such persons as Cutler as a member. The question squarely presented is whether an employer, who is legitimately a union member, commits a crime when he pays dues or other financial membership obligations to the union.

[of a union] in soliciting self-employed entrepreneurs as members." *Ibid.*

While the importance of the question of statutory construction is thus emphasized by what is said in the Opposition, its substantiality is emphasized by what the Opposition leaves unsaid. Neither the Opposition nor any opinion below explains how the prohibition of these union practices furthers the object of § 302 as authoritatively expounded in the *Arroyo* and *Sinclair* cases or how that construction can be squared with §§ 8(b)(1)(A) or 8(b)(4)(A) of the Act. If the Taft-Hartley Act is read as a totality, as this Court's decisions require, it is entirely inconceivable that the same Congress which made it *only an unfair labor practice* for a union to coerce an employer into membership made it a *crime* for the union to accept dues from such employers when they joined voluntarily.

Respondent says (Opp., pp. 24-25) that the challenged construction of § 302 raises no constitutional problems. In our view the constitutional doubts are not only substantial—they are unanswerable. In the very case in which the Labor-Management Relations Act was first held to be constitutional, Mr. Chief Justice Hughes declared it to be a "fundamental right" for employees "to organize and select their representatives for lawful purposes." *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33. Since this freedom of association is guaranteed by the First Amendment, the right of respondent's members to join with other musicians, though they be employers working at the trade, for lawful purposes is constitutionally protected. An interpretation of § 302 which would make it unlawful for some members to share the common expense of all would infringe on the members' right to determine the form of the association without promoting any public purpose. Any limitation on association may be sustained "only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock,* 361 U.S. 516, 524. The decision below raises a question involving every trade union which admits into membership employers working at the trade.

For these reasons, and those stated in the Petition, the writ of certiorari should issue.

Respectfully submitted,

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November 12, 1963.